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In the Supreme Court of the United States.

STATE OF TEXAS *v.* INTERSTATE COMMERCE COMMISSION AND Railroad Labor Board.	Original, No. 24.

BRIEF FOR THE DEFENDANTS ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

The State of Texas, by its attorney general, filed an original bill in equity in this court against the Interstate Commerce Commission and the Railroad Labor Board for the purpose of enjoining them from enforcing provisions of the Transportation Act of 1920, which were set forth in the bill.

The State alleges that the Transportation Act is unconstitutional in many respects, although fails to show any concrete controversy and therefore any justiciable case.

The 21 paragraphs and numerous sub-paragraphs are summed up in the brief which the Interstate Commerce Commission has filed in this case. That brief, however, naturally omits the references to the Railroad Labor Board, to which the present brief is so largely devoted.

The State alleges that many provisions of the Transportation Act dealing with the adjustment of railroad labor disputes and the organization of boards for that purpose are unconstitutional. Thus it alleges that:

(*a*) By the Tenth Amendment the people or the States reserved the right to fix wages and working conditions by contract, and the Transportation Act interferes with this right.

(*b*) The States or the people have reserved the right to prohibit combinations and conspiracies in restraint of trade; the State of Texas has exercised this right; the Transportation Act authorizes carriers and their employees to combine in restraint of trade; and the act is, therefore, void.

(*c*) The act violates the Constitution in granting special privileges. The State apparently objects to the direction that some of the members of the Railroad Labor Board be selected from lists prepared by designated groups of men.

(*d*) By the act violations of the decisions of the Adjustment Boards are made violations of law. It also declares that the State and its people are entitled to be charged in transportation rates for a wage scale and reasonable working conditions produced by competition, and that in violation of this right the "act authorizes the carriers and employees by means of said Adjustment Board erected by themselves to enter into conspiracies in restraint of trade which may materially add to the cost of transportation, and to pass the cost on to the producer and con-

sumer, who are not given the right to be heard by said act."

(*e*) The provision of the Constitution empowering Congress to establish tribunals inferior to the Supreme Court is violated by the sections of the act which provide for the establishment of Boards of Labor Adjustment.

(*f*) Members of the Adjustment Boards are not required by the act to take the oath of office which is required of public officers by the Constitution.

(*g*) Members of the Adjustment Boards are not required to be appointed by the President nor by any head of any department of the Government.

(*h*) The act violates the Fourth and Eighth Amendments inasmuch as it authorizes the Labor Board to give to its determination that any decision of the Labor Board or of an Adjustment Board has been violated such publicity as it may deem to be advisable, thus, the State contends, fixing a penalty which is in its nature cruel and unusual. The State also alleges that through fear of the effect of such publicity the railroads have been compelled to submit to unreasonable contracts and awards.

(*i*) Citizens are denied privileges and immunities and are attainted in that not all citizens are eligible to all boards; and the President is deprived of a constitutional right in being restricted in his right of appointment. The bill also alleges that the act is unconstitutional in that it does not require the taking of the oath of office by those groups of persons (incorrectly called in this paragraph of the bill the

"Labor Group" and the "Management Group"), who prepare the lists of names from which the President, by and with the advice and consent of the Senate, selects six of the nine members of the Labor Board.

(*j*) The sections of the act which designate groups from which members of the Labor Board may be chosen violate the Constitution in that they deprive the President of his plenary power, without the consent of anyone, to fill vacancies which may happen during the recess of the Senate.

(*k*) In view of the due process clause of the Fifth Amendment, the act is rendered void by the alleged fact that no power is given to the commissions, to the public, or to individual citizens to complain to, or to appear before, the Railroad Labor Board.

(*l*) Congress has attempted to delegate legislative power in violation of the Constitution, in that it has attempted to confer upon the Railroad Labor Board and the Adjustment Boards the power to establish wages and working conditions without laying down adequate rules for the guidance of those boards. The bill also declares that the act violates the due process clause of the Fifth Amendment in that it does not require the boards in considering wages and working conditions to take into account factors which the State alleges should be given weight.

(*m*) In authorizing the Railroad Labor Board to have its offices in Chicago the act violates the provision of the Constitution which authorizes Congress to exercise exclusive legislation in the District of

Columbia. The State apparently contends that the Federal Government can function only in the District of Columbia.

(*n*) The act authorizes unreasonable searches and seizures in violation of the Constitution.

(*o*) It repeats attacks upon the act which were made in previous paragraphs, and contends that, in authorizing the Railroad Labor Board to pass upon the question whether an order of that Board or of an Adjustment Board has been violated, the act authorizes an administrative body to pass upon a judicial question, and violates the provisions of the Constitution which prescribe trials by jury.

It will be observed that, although the State repeatedly alleges that provisions of the act which relate to "Railroad Boards of Labor Adjustment" are unconstitutional, no such Adjustment Board is made a party to this suit.

Instead of considering all of the many contentions of the State, this court may very properly limit its attention to those matters in which the bill alleges that the Interstate Commerce Commission or the Railroad Labor Board has acted or is about to act. Those matters may be stated briefly.

The State alleges that the Railroad Labor Board in fixing wages and salaries and in establishing working conditions has caused an enormous and unreasonable increase in the amount of railroad operating expense within the State of Texas, resulting in the necessity for an increased operating income, and that by reason thereof the Interstate Commerce Commis-

sion has fixed fares and charges for the transportation of passengers and freight which are unjust and unreasonable, to the loss of producers and shippers of the State.

It alleges that the Interstate Commerce Commission has authorized railroads within the State to cease operating trains and to dismantle their railroads, contrary to the constitution and laws of the State and in disregard of contract obligations, although, since the railroads are not parties to this proceeding, the State does not ask the court to pass upon those contract obligations; that the Interstate Commerce Commission has refused to permit the construction of railways within the State by persons and corporations who have complied with all the requirements of the State; and that the commission is regulating the issuance of securities by the railroads of the State.

It alleges that the commission has issued an order placing the State in what is designated as the Western Freight Group; that it "has and will continue to require the railroad companies of the State" to make charges contrary to the statutes and constitution of the State, and that "the railroads of Texas are now and will be called upon to pay more than their just share upon property within the State to supply the operating income demanded by the railroads of the United States."

Furthermore, it alleges that the commission has and will, whenever it deems it necessary and desirable, authorize the creation of combinations among rail-

roads within the State without regard for the constitution and laws of Texas relative thereto; and it claims that "the State of Texas in its sovereign capacity is being sued and has been and will be sued and made a party to suits involving the rights, powers, privileges, sovereignty, and property of the State before the Interstate Commerce Commission of the United States contrary to the Constitution."

On October 4 the Solicitor General, on behalf of the Railroad Labor Board, moved to dismiss the bill upon the grounds of the absence of jurisdiction and the lack of equity in the bill. The counsel for the Interstate Commerce Commission also moved to dismiss in behalf of that commission.

As the case is before the court on motions to dismiss, which are tantamount to demurrers, the case is presented to the court solely on the questions of law involved, unincumbered by any questions of fact.

ARGUMENT.

I. JURISDICTION.

This action is in substance an action against the United States; but it is not brought in the only manner nor in the only courts in which such action could be brought.

Under Judicial Code, sections 208, 211, and 38 Stat. 219, 220, any suit to enjoin, suspend, or set aside an order of the Interstate Commerce Commission must be brought against the United States and must be brought in the appropriate district court. These statutory provisions have been applied in the case of a cross bill filed in *Illinois Central Railroad Co.* v. *State Public Utilities Commission of Illinois*, 245 U. S. 493, where the court said (pp. 504, 505):

> By statute such suits are required to be brought against the United States, Jud. Code, secs. 208, 211, c. 32, 38 Stat. 219–220, and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suable only by its consent, could not be sued in a district not within the consent given. See *Finn* v. *United States*, 123 U. S. 227, 232–233; *Schillinger* v. *United States*, 155

U. S. 163, 166. It therefore is certain that the cross bills could not be entertained in the Northern District of Illinois, unless in this regard there be, as is asserted, a valid distinction between a cross bill and an original bill. No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see *Denver* v. *New York Trust Co.*, 229 U. S. 123, 135, and cases cited); but it is otherwise where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class. *United States* v. *McLemore*, 4 How. 286; *Hill* v. *United States*, 9 How. 386; *Reeside* v. *Walker*, 11 How. 272, 290; *DeGroot* v. *United States*, 5 Wall. 419, 431–433; *Carr* v. *United States*, 98 U. S. 433, 437; *Belknap* v. *Schild*, 161 U. S. 10, 16. * * *

As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the commission, and this means that it is to stand in judgment as representing the public. If the State authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature.

The present action was not brought against the United States nor was it brought in the appropriate district court.

The United States has never given its consent to any suit against it involving the orders of the Railroad Labor Board, but it cannot be gainsaid that this case in its essence is a challenge to the power of the United States to enact this legislation for the regulation of interstate rates.

In bringing this suit the State of Texas is in no stronger position than an individual plaintiff would be. The United States can not be sued by a State without its consent. "Public policy forbids that conclusion:" *Kansas* v. *United States*, 204 U. S. 331, 342. *See* also *Louisiana* v. *McAdoo*, 234 U. S. 627.

The State may not challenge the constitutionality of any statutory provisions other than those which it alleges are being enforced or are about to be enforced.

The bill contains many criticisms of provisions of the Transportation Act which have not, so far as the record shows, been put into force. For example, the State contends that the section of the act which authorizes collective bargaining between railroad employees and railroad companies and the section which authorizes searches and seizures are both unconstitutional, although it does not allege that there has been any collective bargaining or any search or seizure accomplished or attempted under color of the act. But it is, in general, unnecessary

to discuss such criticisms of the act. This court refuses to pass upon a constitutional question unless its solution is necessary for the decision of an actual case then before the court (*Hampton* v. *St. Louis, I. M. & S. Ry. Co.*, 227 U. S. 456, 468, 469; *Collins* v. *Texas*, 223 U. S. 288, 295, 296; *Marye* v. *Parsons*, 114 U. S. 325, 330; *Cronin* v. *Adams*, 192 U. S. 108, 114; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, 545; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 163, 164; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Lehon* v. *Atlanta*, 242 U. S. 53, 55, 56); and in determining the constitutionality of a statute the court considers only so much of the statute as applies in that particular case. (*Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 442; *Crane* v. *Johnson*, 242 U. S. 339, 343.)

As this court said in *Muskrat* v. *United States*, 219 U. S. 346, 361, 362, in dismissing petitions for want of jurisdiction:

> That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require

> the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy" to which, under the Constitution of the United States, the judicial power alone extends. * * *
>
> If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.

In *Stearns* v. *Woods*, 236 U. S. 75, where the lower court had dismissed a bill on the ground that no cause of action was stated therein, this court dismissed the appeal, saying:

> The general orders referred to in the bill do not directly violate or threaten interference with the personal rights of appellant—a major in the National Guard whose present rank remains undisturbed. He is not therefore in position to question their validity; and certainly he may not demand that we construe orders, acts of Congress, and the Constitution

> for the information of himself and others, notwithstanding their laudable feeling of deep interest in the general subject. The province of courts is to decide real controversies, not to discuss abstract propositions.

And in *Marye* v. *Parsons*, 114 U. S. 325, 330, the court declared:

> No court sits to determine questions of law *in thesi*. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property. All questions of law arising in such cases are judicially determinable. The present is not a case of that description.

In the present case, the State can not properly challenge the decisions of the Railroad Labor Board. It is true that the State claims that the board has made decisions upon which the railroad companies have incurred greatly increased operating expenses, and that by reason thereof the Interstate Commerce Commission has increased transportation charges. But the State does not make allegations which show that the railroad companies changed wages or working conditions under any compulsion, except possibly the fear of the results of public opinion, which might be enlightened as provided in the act. Certainly unless the railroads were bound by law to comply with the decisions of the board, and did so for that reason, no one can complain that there has been any unauthorized grant of power by Congress to the Railroad Labor Board.

It is not necessary in this case to discuss the extent of the powers of that board. The board was created in order that disputes between railroad companies and their employees might be settled in some other way than by economic struggle or by insistence upon theretofore legal rights in the courts. It was made a mixed tribunal, with members selected from the employers, from the employees, and from the general public. Its decisions undoubtedly have such weight as is given to them by the ability of their members and the representative character of those members; and the board may adequately inform the public as to whether its decisions have been observed. But whether Congress intended that such should be the limit of the powers of the board or intended to give it further powers is a question which is not now before the court, for the railroad companies complied with the decisions of the board without raising the question whether those decisions were legally binding upon the railroads.

The State may not complain of any injury to it which is not alleged to be a direct result of an act of one of the defendants.

The decisions of the Railroad Labor Board did not directly affect the State or any purchaser of transportation therein, and for that reason the State is not in a position to challenge the board's decisions. The board decided in favor of changes in wages and working conditions, upon which the railroad companies incurred increased expenditures, whereupon the Interstate Commerce Commission authorized

the railroad companies to raise their charges for transportation. But the State may not thereupon bring action against the Railroad Labor Board. In *Marye* v. *Parsons*, 114 U. S. 325, which has been followed in later cases (*Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443, 496; see also *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70; *Newark N. G. & F. Co.* v. *Newark*, 242 U. S. 405; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539) a holder of coupons which by contract were receivable in payment of taxes sought an injunction to compel their receipt in payment of taxes, but as he was not himself a taxpayer the court declined to grant him relief. In that case the persons directly affected brought no action, and the court refused to consider the claims of one who was injured only indirectly. In the present case neither a railroad nor the Interstate Commerce Commission is protesting against the decisions of the Railroad Labor Board, nor is any shipper or passenger except in so far as the State may be to some extent a purchaser of transportation; and the securing of relief to the State as a purchaser of transportation is not the substantial purpose of this proceeding.

The State is not seeking to protect the financial interests of the State itself.

The State has not such a financial interest in the outcome of the present suit as to entitle it to maintain the action upon that ground. It is true that in Paragraph III the State incidentally alleges that it is a purchaser of transportation; but the bill as a

whole, and notably its prayers for relief, clearly shows that the State is not in reality seeking relief upon that ground.

In this respect the case is like that of *Georgia* v. *Stanton*, 6 Wall. 50, where the State asked the court to enjoin the enforcement of the Reconstruction Acts, alleging that their enforcement would deprive the State of its property. The court refused to grant the injunction, saying:

> It is apparent that this reference to property and statement concerning it are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed, the case as made in the bill would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

So, also, in the present case the real purpose of the bill is far different from merely securing a reduction of the rates for transportation charged to the State Government.

Again, in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, where the State sought an injunction to restrain the company from discharging noxious

gases from its works over the border of the State upon the territory of the plaintiff State, the court said:

> The alleged damage to the State as a private owner is merely a make-weight * * *. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small.

The court granted the injunction, but it did so upon the ground that the suit was by the State for an injury to it in its capacity of quasi sovereign. (See also *Missouri* v. *Holland*, 252 U. S. 416, 431.)

In the present case the suit should be maintained, if at all, as one brought by the State as quasi sovereign.

While, in the case of a real controversy with a defendant who may be sued, a State may put in issue its rights as a quasi sovereign and the rights which its citizens possess because of their citizenship in the State, it has no right to represent its citizens in other matters. For example, it has no right to raise such a question as whether the Interstate Commerce Commission is exceeding or misusing any powers constitutionally bestowed upon it to the injury of shippers or passengers within the State of Texas.

A Federal court can not consider every suit which a State may see fit to institute. A State can not represent its citizens in all matters. It could not in the interest of even a large number of its citizens go into a Federal court and ask the court to enforce Federal laws for the protection of its citizens. For

example, it could not ask a Federal court to enforce the Federal antitrust laws against specified defendants on the ground that those defendants, by violating Federal laws, were injuring a large number of the citizens of the State. A State may appeal to the Federal courts only in cases in which the property rights of the State or its quasi-sovereign rights or the rights of its citizens as citizens of the State are involved, and not in cases in which it is seeking to represent the individual rights of any number of its citizens. (*Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277. See also *Oklahoma* v. *Gulf, C. & S. F. Ry. Co.*, 220 U. S. 290, 301.)

In the present case, in so far as the State is contending that the Federal rates are unreasonable in themselves, it is asking the court to pass upon a question which the State is not entitled to raise. Even the placing of the railroads of the State in the Western Freight Group, of which the State complains, is simply a matter affecting the railroads and the shippers. It is not a matter in which the State may appear in its own behalf or in behalf of its citizens at large.

2. Defects of Bill.

No facts are averred so specifically that the court may consider them.

The allegations of the bill are not made with such certainty and precision as to present a justiciable controversy to the court, with possibly an exception as to the allegation concerning the placing of the railroads of the State in the Western Freight Group,

and in that matter, for reasons already explained, the State is not entitled to contest the action of the Interstate Commerce Commission.

The State, for example, alleges in Paragraph XXI that the Interstate Commerce Commission has authorized railroads within the State to cease operating trains and to dismantle their railroads contrary to the laws of the State; but it does not allege when or as to what railroad or portion thereof the Interstate Commerce Commission has granted any such authority. And it alleges that "said Interstate Commerce Commission intends and will, whenever it deems it necessary and desirable, authorize the creation and operation of trusts, combinations, and monopolies among railroads in Texas;" but the State does not name any specific railroad companies whose combination the Interstate Commerce Commission proposes to authorize. Such allegations are typical of the bill.

In this voluminous bill there may be isolated allegations which, standing by themselves, would present a justiciable controversy. We do not concede this, for the bill, as a statement of a concrete controversy, is "an infinite deal of nothing," since the plaintiff has so lost its two grains of wheat in two bushels of chaff [1] that this court is justified in dismissing this bill without prejudice to the State of Texas to file a proper bill which would raise in a concrete case a justiciable controversy.

[1] "His reasons are as two grains of wheat hid in two bushels of chaff; you shall seek all day ere you find them; and when you have them they are not worth the search." (Shakespeare, Merchant of Venice, act 1, scene 1.)

3. On the Merits.

other briefs.

Before discussing the bill on the merits attention must be called to the brief filed in the instant case by the counsel for the Interstate Commerce Commission. The United States rests upon the arguments there made and does not consider it necessary to repeat them in the present brief.

Attention must also be called to the brief for the United States in the recent case of *State of Texas* v. *United States*, No. 563 of this term. It will be recalled that that case involved the constitutionality of a provision of the Transportation Act of 1920, under which the Interstate Commerce Commission authorized the Eastern Texas Railroad Company to abandon all operations, both interstate and intrastate, on a designated line of track. The United States there pointed out, with an argument and a discussion which we shall not here repeat, that where the interstate and the intrastate operations of a carrier are inextricably intermingled, so that effective regulation of the one involves also the regulation of the other, Congress may regulate both classes of operations under the power bestowed by the commerce clause of the Constitution; and that where the railroads of the country were taken over by the Federal Government by virtue of the war power, that power also authorizes Congress to provide for the effective rehabilitation of the railroad systems of the country and for such control over particular

parts of that system as will enable Congress to carry out effectively its general plan.

CONTENTIONS WHICH DO NOT CALL FOR DISCUSSION.

It is not necessary to discuss the many criticisms which the State levels at the provisions of the act which deal with the Railroad Boards of Labor Adjustment, for those boards, as distinguished from the Railroad Labor Board, are not made parties to this suit, nor are any acts of such Adjustment Boards properly in issue in this suit.

It is not necessary to discuss contentions that provisions of the act are unconstitutional where it is not alleged that anything has been done or attempted under such provisions (p. 10, *supra*); or even where it is not alleged that there has been an injury to the plaintiff as a direct result of an act of one of the defendants. (P. 14, *supra*.)

It is not necessary to discuss criticisms of the act in which the State does not show that it has either a financial or a governmental interest in the result of the suit. (Pp. 14, 17, *supra*.)

Nor is it necessary to discuss a number of the contentions of the State which are clearly trivial. For example, the State claims that the act is unconstitutional in not requiring the taking of the oath of office by the members of those groups of men who prepare lists from which some of the members of the Railroad Labor Board are selected. The act is silent upon the subject. Even if the members of those groups be considered public officers, it cer-

tainly can not be necessary that Congress should enact concerning them a requirement which is sufficiently set forth in the Constitution. So also the State contends that the act violates the Constitution when it authorizes the Railroad Labor Board to have its offices elsewhere than in the District of Columbia. Such contentions do not require further discussion.

ESSENTIAL QUESTIONS ON THE MERITS.

But several important questions are raised by the bill and will call for serious consideration if it shall be held that the case meets the objections which have been raised as to the jurisdiction of the court and as to the failure of the bill to allege specific facts.

(*a*) When a railroad company is engaged in both interstate and intrastate transportation, may the Federal Government exercise exclusive authority to permit or forbid the extension or abandonment of any portion of the railroad and exclusive authority to permit or forbid the issuance of new securities: in other words, when such a railroad wishes to increase or decrease its financial obligations, may the Federal Government authorize or prohibit such action regardless of the wishes of the State in which the company operates?

(*b*) When railroad companies are engaged in both interstate and intrastate transportation, may the Federal Government authorize combinations of those companies regardless of the wishes of any State?

(*c*) May the Federal Government require that intrastate rates be made to accord with interstate

rates when the interstate rates are not based simply on conditions of interstate transportation within that State but are made to accord with charges in other States based on the conditions of transportation in those other States?

(*d*) When the Federal Government authorizes a State to take part in proceedings before the Interstate Commerce Commission concerning the extension or abandonment of any railroad or the operation thereof, or the issuance of new securities, or the regulation of some charges or practices which are subject to the commission, are the rights of the State being subjected to decision by the commission contrary to the clauses of the Constitution which relate to the decision of cases to which a State is a party?

(*e*) May Congress create a board for the purpose of investigating disputes between interstate carriers and their employees and making recommendations as to wages and working conditions?

(*f*) May Congress establish the principles for the adjustment of labor disputes which are set forth in the act, and has it so far established principles to be observed in the settlement of such disputes as to meet the objection that it has attempted to delegate legislative power to the Railroad Labor Board?

(*g*) May Congress provide that some members of the board shall be appointed from lists of names submitted by the carriers, some from lists submitted by the employees, and some from the general public?

(*h*) Is the act unconstitutional because it does not expressly provide that the commissions, the public,

or individual citizens may complain to or appear before the Railroad Labor Board?

Where a railroad company is conducting both interstate and intrastate transportation, Congress has power to regulate important financial commitments of that company; and its legislation supersedes any conflicting State legislation upon the subject.

Railroad transportation is not conducted by lines which are exclusively interstate and by lines which are exclusively intrastate. The same company conducts both kinds of transportation at the same time, on the same tracks, and often in the same cars, so that in some respects at least the interstate and intrastate activities of the company are inextricably intermingled. This is certainly true when a railroad extends or abandons a portion of its line or issues additional securities. Either of these acts increases or decreases the financial commitments of the company as a whole and affects materially the ability of the company to render efficient service to either interstate or intrastate shippers and passengers. If the company is in a precarious financial condition, as so many railroad companies are at the present time, it is especially important that its financial commitments be regulated in an economic manner, that the company be required to render all services which are really essential for public convenience and necessity, and that it be relieved from rendering services for which there is not sufficient occasion and which can not be performed without a financial loss which weakens the whole transportation system of the company.

If the same act necessarily and simultaneously affects both interstate and intrastate transportation there can be no doubt that Congress has power to regulate that act and that any legislation which Congress has power to enact supersedes any conflicting State legislation upon the subject. As Mr. Justice Hughes pointed out in delivering the opinion of the court in the *Minnesota Rate Cases*, 230 U. S. 352, 399:—

> There is no room in our scheme of government for the assertion of State power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*,

221 U. S. 612, 618, 619; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers Liability Cases* (*Mondou* v. *N. Y., N. H. & H. R. Co.*), 223 U. S. 1, 47, 54, 55.

In the *Shreveport Case* (*Houston, E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342) Mr. Justice Hughes, speaking for the court, again said (pp. 351, 353):

> The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. * * * Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to

> foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

The mere fact that States have heretofore regulated such matters as extensions and abandonments of service and the issuance of securities does not show that Congress may not regulate them to the exclusion of State control. Many State regulations affecting interstate commerce have been sustained in the absence of conflicting Federal legislation but have been held to be no longer operative after Congress had exercised its paramount power over interstate commerce. (*Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Missouri, K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657, 672; *St. Louis, I. M. & S. Ry. Co.* v. *Hesterly*, 228 U. S. 702, 704; *Southern Ry. Co.* v. *Railroad Comn.*, 236 U. S. 439, 448; *Gulf, C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98, 103–105; *Missouri, K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 626. See also *Texas & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41, and discussion in *Minnesota Rate Cases*, 230 U. S. 352, 402–412.)

> No State enactment can be of any avail when the subject of such transactions has been covered by an act of Congress acting within the limits of its constitutional powers *Chicago, I. & L. Ry. Co.* v. *United States*, 219 U. S. 486, 497.

The fact that under State charters there were contractual relations between the railroads and the State is not material. There is nothing in the Constitution which forbids Congress to impair the obligation of contracts (*Hanover National Bank* v. *Moyses*, 186 U. S. 181, 188), and, indeed, Federal regulations of interstate commerce which have impaired the obligation of theretofore valid contracts have been sustained repeatedly by this court. (See *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 613–615, and cases there cited.) Moreover, it seems clear that if under the Constitution the power of Congress over a subject matter is supreme, Congress can not be deprived of that power by any contract between a railroad company and the State.

Nor does the fact that some of the railroads were incorporated under State authority have any greater significance. As Mr. Justice Harlan said, in announcing the decision in *Northern Securities Co.* v. *United States*, 193 U. S. 197, at 345, 349–350, Congress does not have to stay its hands because some of the corporations concerned are State corporations.

> We can not conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment. * * * The regulation or control of purely domestic commerce of a State is, of course, with the State, and

Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government or any legal enactment of Congress. * * * But neither a State corporation nor its stockholders can * * * interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. (Italics in opinion.)

We will not prolong this phase of the argument, for in the brief filed by the Government in the case of *State of Texas* v. *United States*, now pending in this court, we have endeavored to vindicate on broad and comprehensive grounds the right of Congress to enact the Transportation Act.

Congress has power to authorize combinations among, and consolidations of, companies which are engaged in interstate transportation, even though they are also engaged in intrastate transportation and their combination or consolidation would violate a State constitution, State statutes or the common law.

We have already seen that where interstate and intrastate commerce are inextricably commingled Congress may regulate both kinds of commerce. It may regulate the separate companies which are engaged in interstate commerce. It may so regulate their intercorporate relations as to forbid their combination even though it is permitted by State law. It seems to follow, as equally supported by the commerce clause, that Congress may, on the other hand, permit combinations and consolidations among interstate carriers even though such relations are forbidden by State law.

Congress has by other legislation restrained competition among interstate carriers even though competition were permitted by the States. It has required carriers to serve all patrons alike; it has forbidden them to raise or lower their charges without designated ample notice to the public; and it has forbidden companies which reduce charges to meet

water competition to make subsequent increases in those charges due to the termination of that competition, thus restraining competition between railroads and carriers by water. And in the Federal Trade Commission Act (Sept. 26, 1914, c. 311, sec. 5, 38 Stat. 717, 719), it has taken pains to forbid unfair methods of competition. So also many provisions of tariff legislation have been designed to limit competition. Congress has not, in the past, regarded competition as always desirable.

Moreover, this court in the *Express Cases* (117 U. S. 1), established the rule of Federal law that railroad companies are not obliged to furnish equal facilities to all express companies, although as a necessary result of the decision express companies have not been able to compete freely with each other.

Nor have the States always encouraged competition. Many of them have required the issuance of certificates of convenience and necessity by a State commission before a new railroad line could be constructed or an old one extended; and States and municipalities have in many instances forbidden the operation of jitneys or have so regulated jitneys as to make their profitable operation impossible.

And the railroad companies themselves have long monopolized transportation along their own tracks. In the early days of railroad history the companies simply furnished the tracks, while the patrons furnished the cars and the motive power. But such methods of transportation have long been impossible.

For the past 70 years the railroad companies have had a monopoly of the freight and passenger transportation on their tracks.

It is clear, then, that neither Congress nor this court nor the States nor users of railroad facilities have regarded competition as being under all circumstances a necessary or desirable part of the law of the land.

The State, however, claims that in authorizing some combinations among carriers the Transportation Act is in conflict with the common law, and it claims that for that reason the Transportation Act is unconstitutional. But similar contentions for the supremacy of the common law have been made repeatedly in this court, and the court has uniformly sustained the powers of Congress and of the State legislatures to change the common law. (*Munn* v. *Illinois*, 94 U. S. 113, 134; *Texas & P. Ry. Co.* v. *Abilene C. O. Co.*, 204 U. S. 426; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 294, 295; *Wilmington S. M. Co.* v. *Fulton*, 205 U. S. 60, 74; *West* v. *Louisiana*, 194 U. S. 258, 262; *Barrett* v. *Indiana*, 229 U. S. 26, 30; *Second Employers' Liability Cases*, 223 U. S. 1, 50; *Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U. S. 186; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 113; *Western U. T. Co.* v. *Commercial M. Co.*, 218 U. S. 406, 417; *Grenada L. Co.* v. *Mississippi*, 217 U. S. 433, 441; *Slaughter House Cases*, 16 Wall. 36, 65, 66.)

Congress has power to regulate the interstate commerce of the country. In doing so, it may divide the transportation systems of the country into territo-

rial groups which are not bounded by State lines. It may direct railroads within a State to charge for interstate transportation rates which accord with those charged by railroads in other States, and to charge for intrastate transportation rates which accord with those charged for interstate transportation.

The State objects to the action of the Interstate Commerce Commission (in *Ex parte 74*, 58 I. C. C. 220) in placing the railroads of Texas in the Western Group. Theretofore the railroads of the country west of Lake Michigan and the Illinois and Mississippi rivers were in Western Classification Territory. The commission divided the railroads in that territory into the Western Group and the Mountain-Pacific Group, placing the railroads of Texas in the Western Group. The railroads which passed through comparatively level territory were separated from those which passed through mountainous territory and were thus given a more appropriate grouping than had been given to them by the companies themselves. Neither the railroads nor their patrons are complaining of this decision.

But the State objects to this grouping of the railroads of Texas with those of other States and to the provision of the Transportation Act (sec. 422) under which the rates in Texas may be made to correspond with those in other States in the Western Group, irrespective of the needs of the particular railroads. The commission has raised interstate rates in Texas and has raised intrastate rates to correspond therewith, although it has not changed the relation between rates charged by Texas railroads and those

charged by other railroads in the Western Group. The State challenges this decision. Obviously the State can not contest the validity of the interstate rates simply on the ground that they violate rights of the railroads or their patrons which arise out of the Federal Constitution or Federal laws. (*Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277.) But it may be contended that the State has a right to regulate intrastate rates until they are set aside by a valid Federal law or order and that therefore when the Interstate Commerce Commission orders a change in intrastate rates to correspond with interstate rates the State may challenge the order on the ground that the basic interstate rates are invalid.

It is submitted, therefore, that in regulating interstate commerce Congress has power to consider the interests of the country as a whole. It may do far more than prevent State regulation which is inimical to interstate commerce. It may properly disregard State lines and treat the country as being for this purpose one sovereignty, just as it is for the coinage of money and for international relations. So also Congress may, for the purposes of regulation, divide the transportation systems of the country into groups which are not bounded by State lines. It may classify the objects of its legislation at least as freely as the States may do so. The classification authorized by Congress is not totally lacking in logical justification, and this court, as it has so often said, does not pass upon the wisdom or justice of legislation. (*Noble State Bank* v. *Haskell*, 219 U. S. 575, 580;

Green v. *Frazier*, 253 U. S. 233, 240; *Wilson* v. *New*, 243 U. S. 332, 358, 359; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 569; *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 474; *McCray* v. *United States*, 195 U. S. 27, 54–61; *Atkin* v. *Kansas*, 191 U. S. 207, 223.)

For the purpose of building up the transportation systems of the country, Congress has decided that some such classification might be made by the commission and that there should be such uniform rates upon competitive traffic within such group as would "adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation." This regulation is clearly a legitimate regulation of interstate commerce.

The State of Texas, therefore, may not complain that its railroads are grouped with railroads in other States and are directed to charge rates in accord with those charged on the other railroads, and to charge for intrastate transportation rates which accord with those charged for interstate transportation.

The questions which are submitted by the Transportation Act to decision by the Interstate Commerce Commission are administrative and not judicial questions. Therefore those clauses of the Constitution which deal with the exercise of judicial power in cases to which a State is a party do not apply: they do not require the decision of administrative questions by the courts.

While the State is authorized by the Transportation Act, secs. 402 (19), 439 (6), 416 (3), to take part in proceedings before the Interstate Commerce Commission when that body considers the extension or abandonment of any railroad or its operation, or the issuing of new securities, or the regulation of some charges and practices which are subject to the commission, it does not follow that in the absence of such provisions in the Transportation Act the State would be a necessary party to those proceedings or that the questions involved are of a judicial nature.

In those matters Congress has power to regulate the railroads which conduct interstate transportation, and it may regulate them either directly or through a commission. The decisions of the commission do not involve the question whether the railroads and the States have performed their duties toward each other; they do not involve the question whether State regulations interfere unduly with interstate commerce. They are based on the proposition that when a railroad conducts interstate transportation Congress may directly or through a commission determine what course the company must follow in the future in order to conduct, or to be able to conduct, that transportation according to the wishes of Congress expressed through legislation or through an administrative decision. Such decisions are not judicial in their nature.

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to

> exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind. (*Prentis* v. *Atlantic C. L. Co.*, 211 U. S. 210, 226.)

(See also *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 305, 312–314; *Ross* v. *Oregon*, 227 U. S. 150, 163; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 271, 278; *San Diego L. & T. Co.* v. *Jasper*, 189 U. S. 439, 440; *McChord* v. *Louisville & N. R. Co.*, 183 U. S. 483, 495; *Interstate Com. Comn.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 162; *Interstate Com. Comn.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499, 500, 501, 505, 506, 511; Noyes, American Railroad Rates, 212 note, 250; Smalley, Railroad Rate Control (Publications of the American Economic Assn.), 48–50.)

> The function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. (*Knoxville* v. *Knoxville W. Co.*, 212 U. S. 1, 8.)

This court has pointed out the distinction between judicial and administrative powers not only in rate

cases but also in other cases involving railroad regulation. For example, in *Honolulu R. T. & L. Co.* v. *Hawaii*, 211 U. S. 282, the court held that an injunction which constituted

> in substance a regulation of the operation of the railway was, in the first place, not within the limits of the judicial power, and, in the second place, totally inconsistent with the power of regulation vested unmistakably by the legislature in the executive authorities. (P. 293.)

(See also *Atlantic C. L. R. Co.* v. *North Carolina Corp. Comn.*, 206 U. S. 1, 19.)

For the purposes of this case the Railroad Labor Board is to be considered as a board created for the purpose of investigating disputes between carriers and their employees and making recommendations as to wages and working conditions. So considered, there can be no legal objection to the making of awards by that board.

As we have already seen (pp. 13, 14, *supra*), the Transportation Act provides a method by which, in case railroad companies, express companies or sleeping-car companies are unable to reach agreements with their employees as to wages or working conditions, the disputed matters shall be submitted to a board of nine members appointed by the President, by and with the advice and consent of the Senate. It is provided that three members shall be selected from a list of not less than six nominees whose nominations shall be made and offered by employees in such manner as the Interstate Commerce Commis-

sion shall by regulation prescribe; that three members shall be selected from not less than six nominees whose nominations shall be made and offered by carriers in such manner as the commission shall prescribe; and that three members representing the public shall be selected by the President from the general public. The decisions of the board shall be "communicated to the parties to the dispute, the President, each Adjustment Board, and the Commission, and shall be given further publicity in such manner as the Labor Board may determine." The board is also authorized to determine whether its decisions have been violated and make public its decisions in such manner as it may determine. But no further provision is made for enforcing the decisions of the board.

Whether those decisions are legally binding upon the parties is a question which it is not necessary for the court to decide in the present case, for the parties directly interested in them have complied with the awards of the board without raising any question as to their binding force.

Even if the awards of the board are of binding force, Congress has power to establish such a board and such principles for the adjustment of labor disputes as are set forth in the act.

The act does not, as the State contends, interfere with the alleged right of the carriers and the employees to fix wages and working conditions by contract. Its application is expressly restricted to those cases in which the employers and the employees are unable to reach agreements. It is simply to

meet such cases, in order to keep the instrumentalities of interstate transportation in uninterrupted operation at all times, that Congress has provided a means for the peaceful adjustment of labor disputes. The end certainly is legitimate, and the means are plainly adapted to that end and are not prohibited by the Constitution.

But what better means for attaining that end could be devised? Congress can not in fairness provide that in case of disputes the *status quo ante* shall be preserved or that one side shall always yield to the other. It can not leave the parties to the courts, for what is needed is not an adjudication as to what the rights of the parties have been in the past but a determination as to what the relations between the parties shall be in the future, and such a determination is not judicial in its nature (pp. 35–38, *supra*). It has, instead, very properly established a board, thoroughly representative in its composition, to deal with those questions under general rules established by Congress.

Congress doubtless intended that the composition of the Labor Board should give such weight to its decisions that as a general rule it would be unimportant whether or not they were legally binding upon the parties. Whether the parties are as a matter of law obliged to comply with the awards of the board is a question which has not yet been decided by this court and, as we have already pointed out, it is a question which need not be decided in the present case.

But it seems to be self-evident that the nature of the services rendered to the public is such—that those services are so impressed with a public interest—that in order to prevent any interruption in transportation Congress may authorize this board to establish wages and working conditions which shall be binding upon both carriers and employees if they continue to serve the public,[2] subject only to restraints similar to those which are imposed upon the decisions of commissions which regulate the services and charges of carriers and other public utilities.

In *Wilson* v. *New*, 243 U. S. 332, where railroad companies and railroad employees had been unable to reach an agreement as to hours and wages, and Congress had thereupon enacted a statute which established a standard of hours of labor and made temporary regulations affecting the wages, this court sustained the legislation, basing its decision upon grounds which would support more thorough and more lasting regulations of wages and working condistions than in the statute then before the court. It is true that several justices dissented; but the present statute fully meets the dissenting opinion of Mr. Justice Day, for it provides for careful investigation of labor controversies prior to the making of any award, and it establishes for that purpose a board whose very composition makes for fair treatment of all parties.

[2] See Higgins, A New Province for Law and Order, 32 Harv. L. Rev. 189, 193–194.

Congress has sufficiently set forth the principles to be observed in the adjustment of labor disputes.

The State contends that Congress has attempted to delegate legislative power in violation of the Constitution in that it has attempted to confer upon the Railroad Labor Board power to determine wages and working conditions without laying down adequate rules for its guidance. But the act establishes more definite principles to be considered by the board in reaching its decisions than are laid down in the provisions of the Interstate Commerce Act under which the Interstate Commerce Commission regulates rates. (See *Intermountain Rate Cases*, 234 U. S. 476; and also *Interstate Commerce Comm.* v. *Goodrich T. Co.*, 224 U. S. 194.) And even if it did not do so, it might well be sustained, for moderate grants of discretion to administrative bodies are clearly permissible. (See, *e. g.*, *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 427; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 542, 543; *Cook* v. *Burnquist*, 242 Fed. 321, 325; *State* v. *McCarty*, 5 Ala. Ap. 212, 226, 228; *Blue* v. *Smith*, 69 W. Va. 761; *Lee* v. *Marsh*, 230 Pa. 351.) There are special reasons for sustaining such grants of discretion in the case of a board like the Railroad Labor Board. In the case of such matters as come before it, the Government can not properly simply refrain from action. It must reach some decision one way or another. The parties have been unable to reach an agreement, and the real problem before the Government is to find a substitute for that agreement. Only a theorist

would say that in all instances the applying of some abstract principle would be the best substitute for agreement between the parties. In some matters, such as working conditions, the best practical results may be obtained by simply submitting the dispute to the composite judgment of a board consisting of men who can appreciate the viewpoint of the employers, of men who can appreciate the viewpoint of the employees, and of members of the general public who are considering similar problems frequently and are thus both "appointed by law" and "informed by experience." Such a decision will carry weight because of its origin and for that very reason will probably better satisfy the interested parties than would a decision reached in other ways, even though the other decision might appear to strangers to the case to be more in accordance with abstract justice.

The State also contends that the act violates the Constitution in that it does not require the boards in considering wages and working conditions to take into account the value of the services to the carriers and to the public, and the value of the articles handled in commerce. The State, however, does not show that the value of a locomotive to the carriers and to the public or the nature of the goods hauled by the locomotive fixes the price which the railroad must pay for it, or that the price of labor should be fixed on any other basis than that on which the prices of materials are based. To sustain the contention of the State it would be necessary for the

court to decide that when wages are regulated the workers are entitled to share in the profits of a business—a most far-reaching proposition.

Congress may properly provide that some members of the Railroad Labor Board shall be appointed from lists of names submitted by the carriers, some from lists submitted by the employees and some from the general public.

The State contends that the section of the act which designates the groups from which members of the board may be chosen violates the Constitution in that it grants special privileges to some groups of men and denies to other citizens privileges and immunities, and attaints them, in that not all citizens are eligible to appointment, and that it deprives the President of his constitutional rights in restricting his right of appointment and in depriving him of his plenary power, without the advice and consent of anyone, to fill vacancies which may happen during the recess of the Senate.

If the contention of the State is sound, the court may be called upon to declare invalid all laws which provide for minority representation upon appointive boards, such as the Interstate Commerce Commission, the Federal Trade Commission, the Civil Service Commission, and similar boards.

In order to be effective, boards for the adjustment of labor disputes must be selected in some such manner as that in which members of the Railroad Labor Board are chosen. Members of the National War Labor Board, the Shipbuilding Labor Adjustment Board, and other boards for the adjustment

of labor disputes, both in the United States and abroad, have been selected or suggested in manners very much like that followed in organizing the Railroad Labor Board. They have been composed of members selected or suggested by organizations of employers and by organizations of employees as well as of representatives of the public.[3]

It will be observed, moreover, that neither the President nor any appointee of the President nor any aspirant for appointment is complaining of the provisions of the act. This court has declared repeatedly that if a provision of the Constitution which is invoked was not intended primarily for the protection of a party before the court, the court will not inquire into the validity of the governmental action.

The Transportation Act does not deny to the commissions, to the public or to individual citizens any right to complain to or to appear before the Railroad Labor Board. If the board improperly denies the rights of any party, that fact does not render the act itself unconstitutional. But it is submitted that the board may properly confine its hearings to the carriers and their employees.

The State contends that in view of the due process clause of the Fifth Amendment, the act is rendered void by the alleged fact that no opportunity is given to the commissions, to the public or to individual citizens to complain to or to appear before the Railroad Labor Board, although, it is said, the acts of

[3] See, *e. g.*, Monthly Labor Review (of U. S. Bureau of Labor Statistics) for January, 1917, 11–19; July, 1919, 277; November, 1919, 342; February, 1920, 41; May, 1920, 172, 216, 217; June, 1921, 134, 135, 183; Canadian Industrial Disputes Investigation Act, 1907, as amended May 4, 1910, secs. 5–12.

the board affect the public, and the railroad charges to be paid by the public, in a material way.

But it must be remembered that the essential problems before the board simply concern the relations between employers and employees.

4. Conclusion.

We have discussed at considerable length the contentions of the State and believe that we have shown that the court may properly dismiss the bill upon the ground that it is entirely lacking in merit.

But it is submitted that it is not necessary for the court to go so far in the present case—that it is not necessary for the court to go through the vast mass of vague statements and abstract propositions which the State has dumped into this bill to discover whether there is any particle of merit therein—but that the bill may be properly dismissed without further consideration upon the ground that it does not present a justiciable controversy. The Government does not object to having the dismissal made without prejudice to the right of the State to file another bill in the proper court, if it is based upon the specific statement of a concrete case which would bring before the court a controversy of a justiciable nature, and presents matters over which the court may exercise jurisdiction.

James M. Beck,
Solicitor General.
Robert P. Reeder,
Attorney.

December, 1921.

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IN THE

Supreme Court of the United States

October Term, 1920

IN EQUITY

ORIGINAL No. 24

STATE OF TEXAS, Complainant

vs.

THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD LABOR BOARD, Defendants.

Brief, filed by leave of court, by

ALFRED P. THOM,
General Counsel of the Association of Railway Executives, Appearing as Amicus Curiae.

PRESS OF THE SUDWARTH COMPANY, WASHINGTON

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STATEMENT.

The State of Texas, in this case, bases its right to complain and seek relief on three grounds:

1. On the ground that it is a shipper and user of transportation on existing lines of railroad.

2. That it is the owner and operator of a line

of railroad 33.55 miles in length, located wholly within the State and engaged generally in doing business as a common carrier, and

3. On the ground that it is a sovereign State of the United States having a constitution and laws and reserved rights, which, it alleges, have been invaded by provisions of the Transportation Act, 1920, enacted by Congress, which it alleges are in violation of the Constitution of the United States.

The bill alleges that the Interstate Commerce Commission and the Railroad Labor Board are respectively proceeding to administer the provisions of the Transportation Act and have entered orders and, in doing so, are causing, and have caused, a great loss to the producers and shippers of the State of Texas, a great diminution of freight and passenger traffic to the railroads of the State and have caused and are causing, great financial loss to the people of the State, producers, shippers and carriers alike, in violation of their constitutional rights.

The gravamen of the complaint is set forth in paragraph XXI of the Bill, which together with the prayers, are as follows:

> "Complainant avers that the Railroad Labor Board and the Interstate Commerce Commission, without power or authority, constitutional or otherwise, are each exercising functions, powers and authority attempted to be given to each of them respectively by act

of Congress in the 'Transportation Act of 1920' and are making findings, entering orders, and attempting to enforce its provisions in accordance with said act and several sections herein referred to, and are claiming and intend to exercise power and authority under said act and said several sections thereof.

"That the acts of the Railroad Labor Board in fixing wages, salaries, establishing working conditions, practices and regulations of the various employes of the railroads of the United States and of the State of Texas have caused an enormous increase in the amount of railroad operating expense; and that its orders in force and effect at the present time have resulted in unnecessary, unreasonable and unjust wage to many of the employes of the said railroads within the State of Texas; that such salaries and wages are out of proportion to wages paid for like services in other and similar positions and employment, paid and received by the people of the State of Texas, and is an unjust and unreasonable demand upon the railroads of the State of Texas resulting in the necessity for and an increased operating income; and complainant further avers that by reason of such unjust, unreasonable wages, salaries, working conditions, practices and regulations, the Interstate Commerce Commission acting under the pretended authority of the Transportation Act in order to create and obtain for the railroads of the State of Texas an operating income pursuant to the Act of Congress of 1920 above alleged, and sufficient to pay the wage scale

and carry out the practices and regulations so fixed and maintained by said Labor Board, has fixed fares and charges for the transportation of passengers and freight which are unjust and unreasonable. All of which causes and has caused a great loss to the producers and shippers of the State of Texas, a great diminution of freight and passenger traffic to the railroads of the State of Texas and has caused and is causing a great financial loss to the people of the State of Texas, producers, shippers and carriers alike in violation of the constitutional right particularly guaranteed to them by the Fifth and Fourteenth Amendments of the Constitution of the United States.

"That the Interstate Commerce Commission has granted Certificates of Convenience and Necessity to railroads within the State of Texas authorizing and directing them to cease operation of trains and to dismantle their railroads and dispose of their physical property contrary to the Constitution and laws of the State of Texas, and in disregard of their contract obligations with the people of the State of Texas, and particularly of the vicinities through which such railroads pass. That the Interstate Commerce Commission has refused to grant Certificates of Convenience and Necessity and to permit railroads within the State of Texas to advertise and charge fares and freight rates and to receive passengers and freight from connecting carriers and transport same in accordance with the laws of the State of Texas, and has refused to per-

mit the construction of railways within the State of Texas by persons and corporations who have complied with the Constitution and laws of the State regulating the chartering, organization, construction and maintenance of railways wholly within the State of Texas. That the Interstate Commerce Commission is exercising the powers attempted to be granted in the Transportation Act to supervise and regulate the issuance of bonds, certificates and other securities by the railroads of the State of Texas when so issued in accordance with the Constitution and laws of the State of Texas regulating the issuance of bonds, certificates and securities; that thereby the railroads of Texas and the people of Texas are compelled to submit to the demands and conform to the rules and regulations of the Interstate Commerce Commission at an unnecessary expense and great inconvenience resulting in the loss of property and in the taking of their property without due process of law contrary to their right guaranteed under the Constitution of the United States.

"And that the Interstate Commerce Commission is making rates, charges, fares, issuing orders, regulations and schedules and establishing practices requiring and compelling the railroads of the State of Texas to comply and conform thereto; and that the said Interstate Commerce Commission has issued an order placing the State of Texas in what is designated as the 'Western Freight Group' and has and will continue to require the railroad companies of the State of Texas to charge and control fares, rates and charges

contrary to the statutes of the State of Texas and its Constitution and valid contracts of said railroad companies, all of which acts, orders, rules and regulations are contrary to the statutes and Constitution of the State of Texas and the United States, and as heretofore alleged, the railroads of Texas are now and will be called upon to pay more than their just share upon property within the State to supply the operating income demanded by the railroads of the United States; that said Interstate Commerce Commission intends and will whenever it deems it necessary and desirable, authorize the creation and operation of trusts, combinations and monopolies among railroads in Texas without regard for the Constitution and statutes of Texas relative thereto, and thereby the people of the State will be deprived of their right to have competing carriers and freight competition; that the State of Texas in its sovereign capacity is being sued and has been and will be sued and made a party to suits involving the rights, powers, privileges, sovereignty and property of said State before the Interstate Commerce Commission of the United States contrary to the Constitution as herein alleged.

"Complainant further alleges that great and grievous injury and damage is resulting to it and its citizens by reason of the enactment of the Act of Congress known as 'The Transportation Act of 1920'; that it is shorn of large powers of sovereignty, viz: legislative, executive and judicial powers reserved to it by the Constitution of the United States, and it is deprived of privileges and immuni-

ties guaranteed to it as a sovereign under the Constitution of the United States, and that citizens situated in the boundaries of Texas and that its citizens and railroads are unauthorized to do and prohibited from doing acts and things otherwise legal and lawful except for the provisions of said act and the acts of the defendant herein.

"Forasmuch, therefore, as complainant is without adequate remedy at law and its only protection in the premises must arise from the powers of this Honorable Court, in the exercise of its original jurisdiction, the State of Texas respectfully prays that there be granted a writ of subpoena issuing out of this Honorable Court to be directed to the Interstate Commerce Commission by service upon its chairman, Edgar E. Clarke, to the Railroad Labor Board by service upon its chairman, R. M. Barton, the defendants herein named, demanding them and requiring them and each of them to appear and answer thereto, but not under oath, answer under oath being expressly waived; and that the so-called Transportation Act of 1920, and particularly Sections 300 to 316, inclusive, 402 to 407, 416 and 418, 402, sub-divisions 18 to 22, 407, subdivisions 1 to 8, 422, subdivisions 1 to 18, 439, subdivisions 1 to 11, be declared invalid, unconstitutional and void; and that the defendants named herein and constituted bodies corporate be declared and adjudged illegal and without statutory or constitutional authority; and that any and all laws or parts of laws, directing, empowering, regulating the creation, appointment, qualification and terms

of service and granting authority to defendants named and the several members thereof be declared invalid, unconstitutional and void and the acts, orders and all things authorized to be done or performed by defendants be declared void, invalid and of no force and effect and without force of law, or if any part of said Transportation Act of 1920 be held to be constitutional, the remaining sections and portions thereof and all other laws in aid thereof be declared invalid, unconstitutional and void; and that the defendants and each of them be enjoined and restrained from enforcing all or such invalid and unconstitutional portions of the laws herein complained of in the State of Texas in such a manner as to interfere with the regulation of internal affairs of the complainant and the enforcement of its Constitution and its constitutional and valid laws, regulations and contracts, and the constitutional rights of its citizens, and that complainant may have such other and further relief as to this court may seem just and equitable in the premises."

Perhaps it may be illuminating to recapitulate the rights which the State claims in its sovereign capacity and which it alleges have been violated by the exercise of Federal authority in the Transportation Act. It sets up and relies on:

1. State statutes which provide for the incorporation of railroads with no limitation as to time, place, necessity for, or circumstances under which railways may be incorporated and constructed.

2. State statutes regulating abandonment and operation of trains.

3. Constitutional provisions of the State which prohibit the consolidation of parallel or competing lines and State statutes which prohibit the consolidation of railroads within the State with any railroad organized under the laws of any other State or of the United States, and statutes which provide for the maintenance of general offices within the state.

4. Statutes of the State which regulate the issuance of stocks and bonds of railroad companies.

5. Statutes of the State regulating the fixing of rates for transportation.

6. Constitutional provisions which preserve freedom of contract and statutory provisions regulating monopolies and violations of anti-trust laws.

It claims that the rights expressed in these enactments of the State constitution and statutes are inviolate and superior to any Federal authority.

It will be observed that, in the contentions made in the bill, the State does not present for adjudication, or include in its prayer for relief, any property rights under the constitution, or under any of the laws of the State of Texas, or of the

United States; but that, in every instance, it claims that the Transportation Act has deprived it of some right to regulate or control one or more of the several matters covered by the State's statutory and constitutional provisions, as to which it claims absolute supremacy and sovereignty.

The right of the State to maintain this bill, for the purposes mentioned, seems to be settled adversely by the decision of this Court in the case of State of Georgia vs. Stanton, 6 Wall. 50.

In that case it was held that a bill to enjoin the carrying into effect by representatives of the United States of certain acts of Congress, claimed to be unconstitutional, presented a political question only and could not be sustained, the Court holding that:

> "It is only when the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceeding, that Courts of Justice can interpose relief. This Court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened, operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." (Idem, p. 75.)

See also:

> People vs. Barrett, 203 Ill. 99;
> Fletcher vs. Tuttle, 161 Ill. 41.

In the case of Muskrat vs. United States, 219 U. S. 346, the Court, in considering whether or not there could be in that case a judicial determination of the constitutionality of an act of Congress, speaking through Mr. Justice Day, said at page 361:

> "It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress

is not presented in a 'case' or 'controversy', to which, under the Constitution of the United States, the judicial power alone extends."

See also:

Louisiana vs. Texas, 176 U. S. 1, especially concurring opinion of Justice Harland, pages 26-7;
Oklahoma vs. Atchison, Topeka & Santa Fe Railway Company, 220 U. S. 276.

In the case at bar, there are allegations of the unconstitutionality of certain provisions of an Act of Congress, and the prayer is that the authorities created or authorized by it to make orders shall be enjoined from so doing. This presents no "case" for the action of a court. The order, claimed to be invalid in itself, inflicts no injury. It is only when an attempt is made to put it into effect that a justiciable case arises. If a carrier should undertake to put into effect an invalid order of such an authority, a case for relief would arise, and the carrier could not justify under an unconstitutional statute.

It is not fair to jurisprudence to attempt to settle great constitutional questions like those presented here on abstract considerations not involving definite complaints of wrongs to persons or property.

Aside, however, from the objections on the grounds mentioned, the bill is without equity and is based on what, we respectfully submit, is a

misconception of the constitutional justification of the Transportation Act and of the lawful rights and authority of the parties.

The State, in its bill, claims the unqualified right to regulate intrastate commerce within the State and all rates, fares, wages, charges and contracts relative thereto, entered into or made effective within the State, and the unqualified right to regulate private corporations, and combinations, and combinations in restraint of trade and commerce, in such intrastate commerce. (Bill, paragraph VII.)

It alleges that the railway corporations, either by the receipt of grants of land from the States or by the exercise of charter powers and privileges granted by the State, have become obligated by contract, express or implied, to be bound by the laws of the State and by the "lawful rates, fares, charges, classifications, regulations and practices prescribed by the State, or by the agencies of the State for such purpose." (Bill, paragraphs X and XII.)

The bill then proceeds to challenge the constitutional validity of subdivisions 18, 19, 20, 21 and 22 of Section 402 of the Transportation Act, relating to the regulation of the extension and abandonment of lines of railroad employed in intrastate commerce (Bill, paragraph XV, p. 20); subdivisions 1, 2, 3, 4, 5, 6, 7 and 8 of Section 407, relating to the regulation of pooling of freights or earnings and of consolidations (Bill, paragraph XVI, p. 23); of Section 422 (Section 15a of the

Interstate Commerce Act), relating to the regulation of interstate rates (Bill, paragraph XVIII, p. 33 et seq.); of Section 416 (amending Section 13 of the Interstate Commerce Act), regulating intrastate rates in so far as they unjustly discriminate against interstate commerce (Bill paragraph XIV, p. 41), and Sections 300 to 316, creating the Railroad Labor Board and relating to the arbitration of differences as to the wages, rules and working conditions of employees of railroads employed in interstate commerce in so far as they threaten to interrupt interstate commerce. (Bill, paragraph XX, p. 48.)

The challenge is, broadly speaking, on the ground that the provisions referred to violate the Tenth Amendment to the Constitution of the United States, which protects the reserved rights of the States; the provisions of subdivision 3, Section 8, Article I of the Constitution, which confers the power upon Congress to regulate interstate commerce; Sections 1 and 2 of Article III of the Constitution, which confers the judicial power of the United States upon the Supreme Court and the inferior courts of the United States; the Eleventh Amendment to the Constitution, which relates to suits against a State; Section 1 of Article I and subdivisions 19 of Section 3 of Article I of the Constitution, which confer the legislative power exclusively upon Congress; the Seventh Amendment to the Constitution, which guarantees the right of trial by jury, and the Fifth

Amendment to the Constitution, which prohibits the taking of private property for public use without just compensation.

ARGUMENT.

It is well settled that the provisions of the Transportation Act of which complaint is made are administrative and do not involve the exercise of a legislative power.

> "Having prescribed the final and dominant rule Congress may entrust its administration to a subordinate tribunal, such as the Interstate Commerce Commission."
>
> Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 494;
>
> Illinois Central vs. Public Utilities Commission, 245 U. S. 506.

In the latter case it is said:

> "It is admissible for Congress to provide for the execution of this power through a subordinate body such as the Interstate Commerce Commission, and this it has done by the Act to Regulate Commerce."

Administrative bodies, with authority such as is in this Act conferred upon the Interstate Commerce Commission, are well recognized governmental institutions.

Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 542.

It is also obvious that they deal with matters of regulation for the future and are not determining judicial controversies.

Accordingly Sections 1 and 2 of Article III, Section 1 of Article I and subdivision 19 of Section 3 of Article I, the Seventh Amendment and, as no allegation is made that any property has been taken, the Fifth Amendment of the Constitution may be eliminated from the discussion.

Proceedings before the Commission are clearly not suits in the meaning of the Constitution, and are not suits against a State. Therefore it is not deemed necessary to consider the Eleventh Amendment at length.

We assume that the real reliance of the complainant is the Tenth Amendment to the Constitution of the United States.

There is thus presented the broad question of the extent of the power of Congress to regulate interstate commerce.

Constitutional Power.

The history of the adoption of the Constitution of the United States, and the influence upon its adoption of the necessity to establish and protect the freedom of trade between the States is well known, and needs be adverted to only in the most general terms.

After the revolution, the selfishness in trade of these States possessing, by virtue of their location or otherwise, special commercial advantages, became so apparent and was so pronounced that there was a general recognition of the necessity, if there was to be an enduring and peaceful union, to establish an arbiter, which should not be any of the States but an authority impartial between them and representing them all, to regulate interstate commerce. It has been stated by this Court on more than one occasion (Houston & Texas Ry. vs. U. S., 234 U. S. 350; Cook vs. Pennsylvania, 97 U. S. 566), as it is in fact familiar historical truth, that no cause contributed more to the formation of the Union and to the adoption of the Constitution of the United States than the need for a uniform and impartial regulation of the commerce referred to.

Important as this was at the time of the adoption of the Constitution, it has become vastly more so because of the development and improvement of the means of commercial intercourse through the application to it of the forces of steam and electricity and the gasoline engine.

The Constitution ordained that, if Congress so enacted, there should be no state lines as to commerce between the States; and the development of commerce and the welfare of the public have made it necessary that Congress should, as it has done, so enact.

The power to regulate, conferred by the States in the Constitution on Congress, is not simply a

power to control, to surround by suitable restrictions and to prevent abuses; but is also a power to provide for, to foster, to encourage and to protect against unjust discriminations, inequalities and disadvantages by whomsoever sought to be imposed, whether by the carriers themselves or by any public authority, state or municipal.

These propositions are too firmly established by the decisions of this Court to be now questioned: Thus it is held:

> "Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce."
>
> Louisville Bridge Co. vs. U. S. 242 U. S. 117.
>
> "Under the commerce clause of the Constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate."
>
> Ill. Central R. R. vs. Public Utilities Commission, 245 U. S. 506.
> Houston & Texas Ry. vs. U. S. 234 U. S. 357.

This power of regulation, in its aspect of providing for and fostering interstate commerce, would be futile unless it were broad enough to ensure means and facilities and instrumentalities adequate and necessary to the existence and proper

conduct and development of interstate commerce, (California vs. Pacific R. R. Co., 127 U. S. 39), and the power would not be supreme if the judgment of Congress was not conclusive as to the standard of adequacy which must prevail.

The power of Congress must, in the nature of things, be and, under the authorities, is co-extensive with the instrument of interstate commerce.

Minnesota Rate Cases, 230 U. S. 399, 411.
Houston & Texas Ry. Co. vs. U. S., 234 U. S. 351.
Hammer & Dagenhart, 247 U. S. 269.

As stated by this Court in the Second Employers' Liability Cases, 223 U. S. 1, 48:

> "Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention of interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and, if the conditions under which the agents or instruments do the

work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

Congress may determine that the government itself must own and operate these instrumentalities (California vs. Pacific R. R. Co., 127 U. S. 39). It may authorize their use not only for the carriage of interstate commerce but for the carriage of state commerce. (First National Bank vs. Union Trust Co., 244 U. S. 420; McCullough vs. Naylor, 4 Wheat. 316; Osborn vs. Banks, 9 Wheat. 738.)

If it did establish or own and operate them, no one would deny that it would be competent for Congress to fix every rate, both state and interstate, which should be charged for a transportation service by such an instrumentality. If the United States Government hereafter owns them, the entire power of the States in respect to them will disappear.

This, it is obvious, does not mean that Congress would then have the power to fix all intrastate rates, or intrastate rates as such, but only intra-

state rates for services performed by an interstate carrier. The states would still have, and could not be deprived of, the power to fix rates on intrastate commerce not carried by and not affecting a carrier engaged in interstate commerce.

The power, broad enough to accomplish these results through the agency of government owned and operated instrumentalities, is not narrowed by the means adopted by Congress for its exercise; for the choice of means is within the legislative discretion of Congress and does not limit the power. Instead of government owned and operated systems, it may determine that privately owned and operated agencies are preferable in the public interest. If so, its power of regulation is just as broad and unrestricted as if the agencies were government owned. The constitutional basis in both instances is the power to regulate commerce.

An important memorandum on the subject of the powers of Congress, in respect to interstate and foreign commerce, was prepared in November, 1916—not long before his death—by Honorable Richard Olney, Attorney General and Secretary of State in President Cleveland's cabinet, and justly renowned as an eminent authority on constitutional law. A part of it is pertinent here and is respectfully presented for the consideration of the Court:

> "1. For all the purposes and functions of commerce between the states of the United Sattes, between such states and territories of the United States, and between such states and

territories on the one hand and foreign nations on the other, the United States is one country, with complete and exclusive jurisdiction over the whole subject—and state lines and jurisdictions are without significance.

"2. Commerce, in the constitutional sense, covers transportation and intercourse in all forms and whether existing when the constitution was adopted or since introduced and practiced.

"3. The national commerce power, being of such extent and exclusiveness, necessarily subjects to national regulation and control all the agencies and instrumentalities by which national commerce is carried on.

"4. It cannot be doubted that a railroad corporation created by a national charter is an apt instrument for the carrying on of national transportation and that the organization of such a corporation with all appropriate powers and duties is a fit subject for treatment under the commerce power."

In view of this broad and comprehensive grant of power by the States to the Federal Government to regulate—which means not only "to control and restrain," but to provide for, maintain "foster and protect"—the instrumentalities or agencies of interstate commerce and all their operations and activities—the extent of the regulation being confided to the discretion of Congress—it is difficult to understand why the contention should now be in-

sistently and gravely made that if Congress undertakes to regulate or fix the intrastate rates of an interstate carrier, it is invading the reserved rights of the states and violating the Tenth Amendment to the Constitution.

It cannot be denied that the power to provide for, foster and protect—all of which are involved in the power to regulate—includes the power to fix the standard of efficiency and adequacy of the means or instrumentalities for carrying on interstate commerce. That standard—the national standard—must be supported out of all the traffic, state and interstate, of the carriers. If a state disapproves of the national standard and may, by fixing state rates so low as to make an inequitable and inadequate contribution to the support of the interstate agency, it has the power to impose its standard on Congress, or to throw on interstate commerce and the commerce of other states, or on both, the burden of sustaining the national standard of efficiency and adequacy. In either event, Congress would be denied the exercise of its constitutional authority, and the State, not the nation, would be supreme in the national field.

Houston Texas Ry. Co. vs. U. S. 234 U. S. 352-355.
American Express Co. vs. Caldwell, 244 U. S. 624.
Illinois Central R. R. Co. vs. Public Utilities Com., 245 U. S. 506.

The proposition here stated, that the national

standard as to the adequacy and efficiency of the instrumentalities of interstate commerce cannot be surrendered to the state's judgment or prejudiced by the state's refusal to permit state traffic to make equitable contribution to the support, up to the national standard, of these instrumentalities, without an abdication in favor of the states of the power to regulate interstate commerce, follows from the principle announced in the case of Houston Texas Ry. vs. U. S., 234 U. S. 355, where the Court says:

> "It is also clear that, in removing the injurious discrimination against interstate commerce arising from the relation of intrastate to interstate rates, the Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carriers and to the public. Otherwise, it would prevent injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the movement of interstate traffic over the lines in accordance with the terms it establishes."

If the national government has the power, conceded in the case just cited, to fix the standard of rates, state and interstate—which are merely the terms on which interstate commerce is conducted—a fortiori, it has the power to fix and maintain the standard of adequacy and efficiency of the instrument of interstate commerce, which constitutes the basic condition of its existence.

Such being the scope and extent of the constitutional power of Congress to regulate interstate commerce, it is for Congress to determine how much of its power it will at any time exercise.

In the Transportation Act, it has not chosen to go to the full extent of its power. It has not undertaken to fix all rates, state and interstate, of interstate carriers. The power it gives to the Interstate Commerce Commission, as to intrastate rates, is only the power to remove any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

Surely there is ample and undoubted constitutional authority for such a limited exercise of power.

Interpretation of the Act.

In this connection, it may be useful to discuss the proper interpretation, to the extent here pertinent, of the Act and the extent of the power thus conferred upon the Interstate Commerce Commission.

In construing the Act, it must be borne in mind that, up to the passage of this Act, the system of national regulation had for its purpose only the control and restriction of the carriers, and possessed no element of encouragement or protection

and no means of providing for and assuring the adequacy and efficiency of the means of transportation.

This is stated in the following terms by the Senate Committee on Interstate Commerce in its report transmitting to the Senate, with its approval, the Bill which, with amendments, afterwards became the Transportation Act, 1920:

> "Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the states, and with foreign nations, that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of every community in the land. All the railways we have, or substantially all, must be maintained; and, from time to time, they must be enlarged and additional facilities must be provided."

The constructive purpose here indicated found expression in section 500 of the Transportation Act, where it is declared:

> "It is hereby declared to be the policy of Congress * * * to foster and preserve in full vigor both rail and water transportation."

The plan adopted to carry this policy into effect, and the means provided to that end, are found in the rate provisions of the Act which are complained of in this case.

Rates.

It was realized that the policy "to foster and preserve in full vigor rail transportation" could be made effective only if the revenues which the carriers were permitted to earn from their operations, were adequate for that purpose, and hence Congress provided in paragraphs 2, 3 and 4 of Section 15 (a) as follows:

> (2) "In the exercise of its power to prescribe just and reasonable rates, the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

(3) "The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) "For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carrier only that

consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

On the face of these provisions the constructive purpose is expressed "to provide the people of the United States with adequate transportation"—another form of declaring the policy enunciated in section 500 "to foster and protect in full vigor rail and water transportation."

The means adopted was to provide out of rates a net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the property of the carriers devoted, as a whole or in groups, to the transportation service.

To accomplish this the Commission was required to determine from time to time the aggregate value of such property, and, in doing so, to include in its valuation all the property devoted to the service of transportation which it was required to include in its valuation under the Federal Valuation Act, section 19a of the Interstate Commerce Act. This included all the property of the carriers devoted to transportation, both that used in interstate and that used in intrastate transportation.

In other words, the statute directed that the revenues which should constitute a fair return should

be derived from both interstate and intrastate traffic, this including all the operating revenues and not imposing on interstate commerce alone the burden of furnishing the fair return.

There was, however, a difference in the method prescribed for the raising of this revenue from the two sources mentioned.

The Interstate Commerce Commission was given direct and primary jurisdiction to fix interstate rates, but only a supervisory power over intrastate rates to be exercised only if the states failed to establish intrastate rates which would not give preference to their own traffic over interstate traffic and would not unjustly discriminate against interstate commerce.

The only power over state rates denied to the states by Congress was the power to establish an unjust discrimination in favor of their own traffic over interstate traffic and to require the use of the instrumentalities of interstate commerce "in their intrastate transactions in such manner as to affect injuriously traffic which is interstate."

(Illinois Central R. R. vs. Public Utilities Commission, 245 U. S. 506.)

Manifestly, interstate commerce would be injuriously affected and unjustly discriminated against if it could not use the instrumentalities used by both on terms as favorable as intrastate commerce could—if interstate commerce had to pay the bill for maintaining, up to the national stan-

dard of adequacy and efficiency, the agency which was used interchangeably by both, while the state refused to make an equitable contribution. If the standard of adequacy expressly fixed by Congress in the Act must be supported out of the rates derived from both classes of traffic and the state could decline to bear their equitable proportion, either the Congressional standard must be abandoned, or the deficit caused by the refusal of the state must be made up out of increased interstate rates—and thus, in either case, the states would effectually regulate interstate commerce. No interpretation of the Act which would accomplish this result can be accepted.

Section 416 of the Act (Section 13 of the Interstate Commerce Act) confers upon the Interstate Commerce Commission, the National Agency, the power to judge as to this discrimination, and to remove it, if the action of the states results in such unjust discrimination.

It is equally obvious, from another standpoint, that the Act must be interpreted as authorizing the removal by the Interstate Commerce Commission of any unjust discrimination, created by a state, against interstate commerce, or any portion of it, in favor of intrastate commerce, or any portion of it.

Unjust discrimination may exist, and does exist, whenever interstate commerce is injuriously affected by the more favorable terms on which intrastate commerce is permitted to move. The more favorable terms on which intrastate commerce may

move, as compared with interstate commerce, may exclude the latter from markets which each is seeking, or from producing fields on which each is depending. Certainly more favorable terms permit those engaged in intrastate commerce to conduct their businesses at less cost and under more advantageous conditions than those engaged in interstate commerce and thus create an advantage to the more favored localities within a state than apply to localities which must deal on the less favorable terms prescribed by national authority for interstate commerce. This latter kind of unjust discrimination is that which is most in the public mind, and, as to which, the law is entirely clear that the national authority must possess the power to protect interstate commerce against any such inequality of commercial opportunity.

It is accordingly submitted that, from whatever standpoint the subject be viewed, the Act must be interpreted, in its provisions as to State rates, as conferring upon the Interstate Commerce Commission a power, and a power only, to see that all unjust and unreasonable advantages of state over interstate commerce, and all unjust discrimination of state against interstate commerce, are removed, and that there be no substantial inequality of commercial opportunity to the prejudice of interstate commerce in the use of the instrumentalities of interstate commerce.

It cannot be successfully asserted that the powers conferred by the Act, as to interstate rates and as to unjust discrimination against interstate com-

merce, are not within the constitutional grant of power made to the National Government by the States to regulate interstate and foreign commerce.

Nor can valid criticism be made of the method of rate-making, by groups, prescribed in the Act. It is the method which was adopted and followed by the Commission before the Act was passed. It is the only method possible. Rates must, in the nature of the case, be uniform in a given traffic territory or group. It is impracticable to prescribe different rate levels for the several carriers. They must be made, and have always been made, except in the era of rate-cutting and its consequent disorganization, by reference to average conditions in a group, and this is all that the Act requires and is proper and lawful regulation.

Whether the recapture clause is constitutional need not here be considered, for there is no allegation in the Bill adequate to sustain the right of this complainant to attack it.

It is respectfully submitted that no decision should be made in this case as to the validity of this recapture clause. That question should await a real case presented by a party having a substantial property right which he alleges has been invaded and for which he seeks protection.

Extensions and Abandonments.

It being a constitutional power of Congress to "foster and protect" interstate commerce and to preserve its instrumentalities in full vigor, it is

manifestly within its power to preserve their credit, to prevent the waste of their means and to ensure the application of available funds to the purpose of fulfilling charter obligations as to service to the public. While it may not be within the constitutional power of Congress to require extensions beyond the scope of a carrier's charter obligations, it is manifestly within its power, and an exercise of lawful regulation, to prevent the waste of a carrier's resources in the construction of useless extensions, which may be used to impose an unnecessary burden on the users of transportation, and also within its power to authorize the abandonment of useless lines, the continuance of which would involve an impairment of the carrier's ability to perform its public duties except at the cost of the continuance of an unnecessary and unjustified burden upon the public. This is a legitimate exercise of the power of regulation.

Pooling and Consolidations.

It is for the practical judgment of Congress to decide whether, if there be a regulated pooling of earnings among carriers, it will save unnecessary duplication of service and, if so, to authorize the saving, for every unnecessary duplication of service is a drain to that extent on the resources of the carriers and, if continued, would furnish a basis for larger charges for the transportation service. If it is good for the public that transportation energy be not wasted, but be organized and efficiently

directed, then manifestly the regulated pooling of earnings is justified as a part of legitimate regulation.

The same general considerations apply to consolidations. Consolidations of carriers promote economy and lessen the public burden of support. If carried out as in the Act directed, by preserving competition and equalizing transportation conditions and relatively transportation revenues and costs, it simplifies the problem of rate-making and removes existing causes of rate inequalities. Manifestly the regulation of consolidations, as done in the Act, is also a proper exercise of the constitutional power of regulation.

Railroad Labor Board.

Since the case of Wilson vs. New, 243 U. S. 332, it can scarcely be doubted that it is a proper exercise of the constitutional power of regulation to fix, by Congressional action or authority, wages and adjust labor disputes between interstate carriers and their employees, in order to avoid an interruption of the public service by these vital agencies. This is as far as the Transportation Act goes, and, while the power of regulation may extend much further, the validity of this exercise of power under the commerce clause must now be conceded.

If what has been done in the Act is within the power of regulation conferred by the Constitution, then the Act of Congress is supreme. It does not violate the Tenth Amendment, because no reserved power of the States has ben invaded.

It makes no difference what the laws of the State on the subject are, nor whether they are expressed in a State Commission's order, or in a State statute, or in a State constitution, for the Act of Congress, being a proper exercise of a power conferred by the Constitution of the United States, is supreme, is the Act of the State itself through its chosen agent, the National Government, on which it has conferred complete and supreme power to deal with the subject and to the recognition of which as supreme the State is bound by its covenant with its sister states.

It being a proper exercise of the power of regulation, it likewise, cannot be prevented or interfered with by any contract right, for all contracts with interstate carriers are entered into with the implied understanding that they are, and must be, subject to the full exercise, then or thereafter, of the power of regulation, so that when valid regulation is enacted inconsistent with the contract, the contract necessarily fails.

Louisville & Nashville R. R. vs. Mottley,
219 U. S. 467.

The legislation of the States in whatever form expressed, its contracts and its policies, must give way to the exercise by Congress of its legitimate powers of regulation.

This does not constitute a denial of a reserved right of a State, for the State has reserved no such right.

On the contrary, it is the protection and enforcement of the acquired right of the State—a right which it acquired when it entered the Union—to be assured by a national and impartial administration of the powers of government of adequate and efficient means of transportation, to equality, as between it and its sister states, of commercial opportunity and to freedom of trade with, and unobstructed enjoyment of, the producing fields and commercial markets of all the States.

It is not a denial, but is an assertion and a preservation, of States Rights.

Respectfully submitted,

ALFRED P. THOM.

WASHINGTON, D. C.
DECEMBER 1, 1921.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

THE STATE OF TEXAS,
Complainant,
vs.
THE INTERSTATE COMMERCE COMMISSION, ET AL,
Defendants.

Original No. 24 In Equity.

BRIEF FOR THE STATE OF TEXAS

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Washington, D. C., December 3, 1921.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

THE STATE OF TEXAS, *Complainant* vs. THE INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants.*	Original No. 24 In Equity.

BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

The issues raised in No. 206, Railroad Commission of Wisconsin, et al, vs. Chicago, Burlington & Quincy Railroad Company, and also in No. 298, State of Texas vs. Eastern Texas Railroad Company, et al, are also raised in this bill. Both of the above cases are under consideration by the Court at this time, and the briefs filed are, as to the questions raised, exhaustive. We have considered it best to adopt the briefs of Appellants and Interveners in No. 206 and of Appellant in No. 298, as our brief on such questions as are therein treated and such additional briefs as we now present on these questions are asked to be considered in the nature of a supplemental brief. Complainant is a party to each of the above cases.

We call attention also to Appellant's brief in another case now under consideration on some of the same questions, the case being No. 283, State of New York, et al, vs. United States, et al.

STATEMENT OF CASE

This is a suit of a civil nature brought by the State of Texas in its sovereign capacity under the Constitution of the United States, and particularly of paragraphs 1 and 2 of Section II of Article III, giving this Court original jurisdiction. The action is by the State against citizens of another State. More than the jurisdictional amount is involved.

Complainant sues as a sovereign State and alleges that it has exercised its powers under the Constitution of the United States to control its internal commerce; has adopted a constitution and passed laws completely regulating and controlling same and especially with reference to equal rights, due process, special privileges and franchises, perpetuities and monopolies, private corporations, common carriers and railways. Has passed all necessary or expedient laws for the incorporation of common carriers; the regulation of the issuance, sale and ownership of stocks, bonds and securities; and the complete policing of same, protecting the interest of the carriers as well as the public.

It is also the owner of a line of railway and a large shipper of freight and patron, through its officers and employees, of their passenger service. A department has been created under the constitution of the State known as the Railroad Commission, which exercises legislative, administrative and judicial powers in the enforcement of all such laws, making regulations, fixing rates, fares and charges, and generally with authority completely to administer all laws of the State relative to carriers with provisions for

meeting such emergencies as may arise, in order to fully and completely protect the interest of both the carriers and the people. Such sections of the Constitution and such Statutes as are relied on, are copied in the bill as exhibits and are here respectively referred to.

THE BILL OF COMPLAINT

In Paragraph I, II and III, the parties complainant and defendants are set out together with grounds claimed to give jurisdiction.

In Paragraph IV it is alleged: That all railway corporations which own and operate lines of railway in the State of Texas are incorporated and chartered under the laws of the State, except the Texas & Pacific Railway Company, which is chartered under the laws of the United States.

In Paragraph V it is alleged: That in 1845 Texas was admitted into the Union; that it has since been continuously a State of the United States, and that it was so admitted on an equality with other States in all respects whatsoever, except that it retained the ownership of, and ever thereafter continued to own, all public lands within its borders.

In Paragraph VI it is alleged: That, in the Constitution of the United States, no power of police or legislation with respect to the internal affairs and intrastate commerce of Texas is delegated to the National Government.

In Paragraph VII it is alleged: That among the powers reserved to the States are, the right to regulate intrastate commerce, and all rates, fares, wages, charges, and contracts relative thereto entered into or made effective within any State, and the right to regulate private corporations, and combinations and restrictions in trade and commerce in intrastate commerce.

In Paragraph VIII it is alleged: That, under its several constitutions and various statutes, the State of Texas has

exercised the powers reserved to it as aforesaid, and that its constitution contains provisions as stated in this paragraph.

In Paragraph IX it is alleged: That, under its constitution, the State of Texas has enacted a full and complete code of laws relating to railroads and common carriers, corporations, trusts and monopolies, and that said laws contain provisions as stated in this paragraph.

In Paragraph X it is alleged: That the State of Texas has granted to various railroad corporations of that State approximately 24,454,713 acres of land, upon condition that they comply with the terms of their charters, including laws applicable to rates, fares, charges, classifications, regulations and practices prescribed by laws of the State or by agencies of the State, and that the charters, so conditioned, were accepted by the corporations and are now contracts and binding upon such corporations and their successors.

In Paragraph XI it is alleged: That, with one exception, the Gulf, Colorado & Santa Fe Railway Company, which owns a small amount of mileage in Oklahoma, the State of Texas has confined the corporate powers of railway corporations chartered by it within the limits of the State; that the State has prohibited any corporation, except one chartered by it or by the United States, from owning or operating any railroad in Texas, and that no railroad corporation, except the Texas & Pacific Railway Company, operates in Texas under a United States charter.

In Paragraph XII it is alleged: That bonds in the aggregate amount of approximately $358,382,410 have been issued by railroad corporations chartered by Texas, upon condition that the corporations shall operate their lines of railroad in accordance with the laws of the State and be governed by the lawful rates, fares, charges, classifications, regulations and practices prescribed by the State, and that the State has not consented to the abrogation of such obligation.

In Paragraph XIII it is alleged: That within the State of Texas the constitution and statutes of the State are applicable to the line of railroad operated by the Texas & Pacific Railway Company; that all the railroad corporations of the State are bound to observe the rates, fares and charges of the State, and that the State has never consented to the abrogation of this obligation.

In Paragraph XIV it is alleged: That the State of Texas is not asking the court to determine whether the charter contracts referred to exist; that allegations concerning such contracts are made simply to show that the power and authority attempted to be conferred on the Commission to determine and fix rates, fares and charges for intrastate commerce within the State of Texas, to determine when railway corporations within the State may cease operation, and take up and abandon their lines of railway, or construct additional lines of railway, or issue stocks, bonds and securities, or form pools and combinations, or consolidations, can not constitutionally be conferred upon the Commission, and that the provisions of the transportation act which purport to confer such authority are unconstitutional.

In Paragraph XV it is alleged: That the Government of the United States and the Congress, and the Commission, have no authority to determine a justiciable question where the rights of a State are involved; that such a question can be determined only by the Supreme Court of the United States; that no citizen of the State of Texas or of any other State, and no corporation of any kind or character, can bring an action against the State of Texas, or against those acting for it as public officers, in any court, or before the Commission, without the consent of the State of Texas; that such consent has not been given, and that subdivisions 18 to 22, inclusive, of section 402 of the transportation act, which purport to confer certain authority upon the Com-

mission, including authority to determine justiciable questions like the one above mentioned, and to confer certain authority upon railroad corporations of the State of Texas, are unconstitutional.

In Paragraph XVI it is alleged: That section 407 of the transportation act, particularly paragraph 1, and subdivisions 4, 5, 6 and 8, which purport to confer certain authority upon the Commission, and upon railroad corporations of Texas, in connection with contracts, agreements, combination and consolidations, in derogation of the constitution and laws of the State is unconstitutional.

In Paragraph XVII it is alleged: That section 439 of the transportation act, which purports to confer upon the Commission control over the issuance of stocks, bonds and other securities, and over the assumption of liability as lessor, lessee, guarantor, indorser, surety or otherwise, by railroad corporations of Texas, in derogation of the Constitution and laws of the State, is inconstitutional. Complaint is made in particular that said Act violates Sec. I, Art.I, and Sub. 18, Sec. 8, Art. I, of the Constitution in that legislative power is delegated by Congress to the Interstate Commerce Commission; That it violates the due process clause of the Fifth Amendment; That it authorizes officers of one railroad to serve as officers of a competing road in violation of the laws of Texas, passed in pursuance of its power reserved to it under the Tenth Amendment to the Constitution of the United States; and also by Sub. 3, Sec. 8, Art. I, U. S. Constitution.

In Paragraph XVII it is alleged: That the State of Texas possesses certain natural advantages in climate, topography and building materials which have enabled the railroads to construct and maintain their lines at a substantially smaller cost than in the other sections of the territory included in the "Western Group" with which it has been placed for

classification and rate making; The value per mile, of each road, is tabulated and attached as Exhibit No. I;

The right of the State to fix rates, fares and charges in proportion to the value of investments, which right is guaranteed to it under the Constitution but which has been abrogated by Section 422 of the Act complained of; That a complete analysis of said Section, which is therein fully set out, renders it violative (a) of the Tenth Amendment to the Constitution in that the reserve powers of the State are usurped; (b) of the various sections, and each section which recognizes the State as a governmental unit for commerce, taxation and duties, and prohibits the formation of new States within the jurisdiction of another State or by the junction of two or more States, (c) of the Fifth Amendment in that it authorizes charging rates and fares to bring an income in proportion to the value of the average for the group of States instead of for the State; (d) of Sub. 3, Sec. 2, Art. 1 and Sub. 4, Sec. 9, Art 1, of the Constitution, forbidding the levy and collection of taxes except in proportion to the population of the States, and of Sub. 1, Sec. 8, Art. 1, which says that duties, imposts and excises shall be uniform throughout the United States; (e) of each of said provisions of the Constitution above stated in that one-half of all profit a road may make in excess of 6% of its value shall go to the public treasury, this being nothing more than a direct tax; (f) of the Fifth Amendment in that subdivision 17 provides that if any particular rate may reflect a proportion of excess income to be paid by the carrier into the public treasury, yet, the shipper shall not be entitled to recover the same, nor be entitled to reparation therefor; (g) of the Fifth Amendment, in that the carrier is permitted to retain one-half of all excess over 6% on its investment, that amount being found by the act to be a just and reasonable income; (h)

of Sub. 3, Sec. 8, Art. 1, of the Constitution, in that specified sections of the Act permit the use of public funds for other than Governmental purposes.

In Paragraph XIX it is alleged: That the several Acts which the Interstate Commerce Commission is authorized to perform relative to fixing and prescribing rates within the State violate the provision of the Constitution reserving such powers to the State and the principles of rate making therein provided for are contrary to sanctioned principles which permit the Government to prescribe rates within a State; that the effect, if any, sought to be removed from interstate commerce is too remote to be within the power of the general Government. That in effect the procedure prescribed is that of a suit before the Interstate Commerce Commission as a court against the States, contrary to their guaranteed rights to be immune from suit by private individuals except by its own consent. That the several provisions are so vague, indefinite and uncertain that it amounts to authority by Congress for the Interstate Commerce Commission to enact the law, a power it cannot delegate.

In Section XX of the Bill (page 48) it is alleged: That Sections 300 to 316, inclusive of the Transportation Act of 1920, provide for the creation of a Railroad Labor Board" and "Boards of Labor Adjustment." These will be referred to as the "Labor Board" and "Adjustment Boards." The powers of each board are set out and the Act creating them is attached as "Exhibit No. 14," at pages 152 to 159 of the Bill. The manner and power of appointment, the restrictions of appointees to certain classes not determined by qualifications, experience, or fitness but only by the membership in a class or organization of society, the composition of the board as a corporate entity, arm of the Government, composed of representatives of classes or organizations which the Act recognizes as in opposition to

the public and public interest and the appointment, designation and payment of salary to such persons while representing such class or organization as opposed to the Government, are each and all complained of as being in excess of the powers granted to the Congress under the Constitution, and particularly in violation of the sections pointed out in the pleadings. Complaint is also made of the powers given to the board and the punishment it may assess for failure to comply with its findings or requirements. Said sections particularly violate the Tenth Amendment to the Constitution of the United States in that certain powers reserved to the States are lodged in the "Adjustment Boards" and "Labor Board." Among the powers so complained of are the powers to prosecute and enforce contracts between employer and employee and to form combinations and conspiracies in restraint of trade in violation of the Constitution and laws of Texas, adopted and passed in pursuance of its right under the Constitution of the United States. Said Boards are given judicial authority in violation of Subdivision 9, Section 8 of Article 1 of the Constitution of the United States and the members are not required to take the oath prescribed in Subdivision 3, of Article 6 of the Constitution of the United States.

It is further complained that the penalty affixed is in violation of the Fourth and Eighth Amendments to the Constitution of the United States.

Paragraph XXI concludes the Bill and is the prayer for relief against both parties defendant from either enforcing the unconstitutional statutes or from further promulgating and enforcing the arbitrary rules and regulations to the injury of complainant.

ISSUES OF FACT:

Allegation is made that the Interstate Commerce Commission is a corporate body having capacity to sue and be

sued and has regulatory powers over carriers in the United States engaged in interstate commerce. Allegation is also made that the Railroad Labor Board is a corporate body vested with administrative and regulatory governmental powers, established and existing under an Act of Congress approved February 28, 1920, (41 S. L. 469, Sec. 300 to 316).

It is alleged that Texas has approximately 265,000 square miles of territory and great natural resources, much of which are undeveloped, a population of more than 4,600,000 people, a total railroad mileage of about 16,000 miles, and operated by approximately 125 companies, which, with one exception, are incorporated under the laws of the State of Texas, and which, with one exception are confined in their operation to the State of Texas. The mileage and valuation of each road is pleaded and fully set out in exhibit No. 1. It is also alleged that the State has granted all charters with the express provision that all laws of the State relative thereto be accepted as a part of the charter and become a binding obligation between the State and such carrier. As a consideration for all of the obligations so assumed by the carriers, the State extended its police powers, right of eminent domain, granted rights of way over its public highways, streams over 30 feet in width, all of which are owned by the State, and in enumerated instances conveyed to such carriers large and valuable acreage, of the public domain, amounting in all to about 35,768,718 acres, (Exhibit No. 6, page 129 of the Bill) for which the carriers under express contract agree to obey the laws of the State and comply fully with the terms of their charter. That the State of Texas has not consented to the abrogation of such contracts. It is specifically stated, however, (Sec. XIV, page 18) that such contracts are not pleaded for the purpose of invoking the jurisdiction of this court at this time to determine whether or not such facts do constitute contracts, or

whether or not such contracts exist, but for the purpose of showing that the powers attempted to be given the Interstate Commerce Commission conflict with the rights and powers of the State in such way as to present questions for judicial ascertainment, and, therefore, violate the judicial clause of the Constitution and the due process clause of the Fifth Amendment to the Constitution.

It is alleged that the topography of the State and its natural resources have vied in permitting economical construction and maintenance of the railroads and the regulations of the Railroad Commission have secured the use and benefit of such natural advantages, and has caused the roads of the State to be, in the main, economically and properly constructed, and has continued to procure and secure proper and adequate maintenance. That the average valuation per mile of the railroads in Texas is materially less than the average valuation of such property throughout the United States, or throughout the group or district in which it has been placed for regulation by the Interstate Commerce Commission.

The action of the Interstate Commerce Commission in: Ex parte 74, in the matter of applications of carriers for increased rates, as reported in 58 I. C. C. page 220; No. 11,764 in the matter of Intrastate rates within the State of Texas, reported in 60 I. C. C. page 421; and other orders affecting intrastate rates and regulations, are alleged as acts violative of the State's rights and it is asked that the Interstate Commerce Commission be enjoined from enforcing such orders and exercising authority as thereby exercised and claimed.

Other acts of the defendant Commission complained of, for which similar relief is sought, are enumerated, among which are the following:

That said defendant has issued certificates of convenience and necessity authorizing carriers whose property is

situated wholly within the State, to abandon operation and to dismantle and remove the tracks, contrary to the laws of the State of Texas;

That said defendant has refused to grant certificates of convenience and necessity for the construction of roads wholly within the State, and to advertise and charge rates and fares and to receive passengers and freight from connecting carriers, after such companies had complied with all laws and requirements of the State;

That said defendant is exercising and attempting to exercise, power and authority in the regulation of the issuance, sale and ownership of stocks, bonds, and securities of railroads of the State of Texas, after such carriers have complied with the laws of the State of Texas relative thereto;

And that said defendant is making rates, fares and charges, issuing orders, rules, regulations and schedules and compelling the railroads to comply therewith; and, has placed the State of Texas in what is designated the "Western Freight Group," and has and will authorize and require the railroads of the State to charge and collect fares, rates and charges, based upon the valuation of all roads in the group and contrary to the laws of the State of Texas;

That said defendant intends and will, if not restrained, authorize the creation and operation of trusts, combinations and monopolies among railroads in Texas, contrary to the Constitution and laws of the State; and,

That the State of Texas has been, is now being, and will be made party to actions involving the rights, powers, privileges, sovereignty, and property of the State before the Interstate Commerce Commission.

As to the Labor Board and the Adjustment Boards, it is alleged that their action in fixing wages and salaries, establishing working conditions, practices and regulations

of the various employees of the railroads of the State have caused enormous increase in the operating expense; and such orders have resulted in unnecessary employment, unreasonable and unjust wages to many of the employees of the railroads of the State of Texas; That such salaries and wages are out of proportion to wages paid for like services in other and similar positions and employment, paid and received by the people of the State of Texas; and is an unjust and unreasonable demand upon the railroads of the State, resulting in the necessity for an increased operating income;

That, because of such actions of the Labor Board, the Interstate Commerce Commission has fixed unjust and unreasonable charges, rates and fares, all of which have caused and are causing great loss to the producers and shippers of freight in the State of Texas, a great diminution of freight and passenger traffic to the railroads and have caused and are causing great financial loss to the people of the State of Texas, producers, shippers and carriers alike.

These and all other facts alleged are admitted by both the defendants to be true.

QUESTIONS OF LAW:

A. B. C.

The Bill raises the often considered question of how far Congress may go in the regulation of interstate commerce but the questions presented are different to those heretofore considered, are questions, in many instances, of first impression, for the reason Congress has never heretofore asserted its power over intrastate Commerce except when interstate commerce was directly and substantially involved. The various sections of the Act involved in this cause ignore any rights of the State to control its internal commerce, apparently upon the theory that no such thing or right

exists. The most that can be said is that interstate commerce is very remotely involved and that only theoretically and not actually. The legislation complained of relieves interstate commerce of no actual burden, gives it no substantial relief from existing conditions, but is purely experimental. Yet, at the same time the power of the States to regulate their internal commerce has been by the Act annihilated. The questions of law thus complained of will be treated minutely in the argument to follow.

ARGUMENT

The writer of this brief feels the strongest possible argument which can be presented in behalf of Complainant's contentions may be found in the bill itself, tersely stated in the language of the late Attorney General of Texas, now Chief Justice of the Supreme Court of the State. For that reason the various complaints raised in the bill are herein referred to and adopted as a part of the brief and the court is respectfully urged to consider the bill not alone to determine the issues raised, but for the proper interpretation of the laws complained of therein.

This action is to restrain the Interstate Commerce Commission and the Railroad Labor Board from performing certain Acts and to declare unconstitutional, null and void the Acts of Congress under which they claim authority to act, and thus to nullify orders heretofore made in pursuance thereof. Under the pleadings relief may be granted as to any illegal act of either defendant regardless of the court's holding as to any other. We respectfully request that this be done.

Section I.

In this section we shall treat only of that part of the complaint relating to the Interstate Commerce Commission. We shall divide this argument into three sections, the first

relating to the rate making power, second, powers to order abandonments and extensions, and third, power to regulate issuance of stocks, bonds and securities:

Rate Making Power:

In the frequently quoted Shreveport Rate cases a new principle was established or, at least finally settled. Recognizing the limitations placed upon the authority of the Commission to interfere with State rates only for the purpose of removing actual, unjust and unreasonable discriminations against interstate commerce, Congress has attempted to broaden such powers, if we are to accept the interpretation which the Interstate Commerce Commission has placed upon the Act, but which we do not accept, and to create a condition which can be for no other purpose than to force the internal commerce of the several States to assume the burden of producing a given amount to support the carriers engaged in both intrastate and interstate commerce. This obligation is decreed to be discharged jointly between the two and the State has no option of discharging this burden by furnishing a greater tonnage of freight and a greater number of passengers or of relieving its carriers of any burdensome regulations, taxes or other expense, or all of these. But, regardless of tonnage, operating expense, original investment of the carrier within the State or any other factor in determining a reasonable net corporate income for the carrier involved, a sum is set to be raised from all traffic within a group of States and each State is arbitrarily required to fix a *rate* equal to the rate fixed for interstate commerce in order to realize a net corporate income in the aggregate equal to 5½% plus ½% of the total estimated value of all carriers' property within the group of States. Net income, yes, even gross income, as well as percentage of income, are all ignored. The *rate* is

made the basis regardless of right or reason. It is purely arbitrary. The facts pleaded and admitted in this case are to the effect that the railroads are more economically constructed and maintained than the average value placed upon all roads in the group. The difference is substantial. It follows that the people of Texas are paying more than their just proportion of the net income found to be reasonable, and allowed. All balance over such allowed income is divided, one-half going to the carrier and the other half going to the Federal treasury. Two objections are raised to this and we submit both are well founded. First, such fifty per cent of excess, is that much more to the carrier than it has been found it is entitled to receive. No power lies in Congress to collect from the people more than a reasonable income for the investment. Second, a tax is here collected from the people of the State contrary to taxing power under the Constitution of the United States. Paragraph 4, Section IX, of Article I, of the Constitution.

The carriers have filed a brief in the "Wisconsin Case" in which they delve into the history of the time for a proper interpretation of the Constitution. That brief is now before the court and will be considered in connection with this case. Counsel should be permitted to do this and we call the court's attention to a few pages in history having a direct effect on our Constitution in the matter of taxation. We were forming a government to take a place of power in the world. Many empires had been built and successively crumbled. Not a powerful nation had fallen in historic time so long as there was no internal dissension. Two problems had been paramount in all governments and from the beginning of time had baffled the talents of wisest statesmanship. These problems were taxation and transportation. No solution had then been found and the Act before us will fall far short of the mark if upheld.

But the framers of our Constitution gave greatest consideration to the question of taxation. *Any direct tax not based on population was prohibited.* There was a reason for this and to this Counsel will agree, not a more positive inhibition in the Constitution than this yet the Act lays such a burden—our carriers, even the States' own intrastate commerce, disregarding population, or representation, must bear it.

The State of Texas has prescribed rates, fares and charges which its roads are obligated under their charters to respect. They still operate under the charters, claiming and exercising the rights, privileges and immunities thereof. So long as a railroad operates under its charter it must comply with its terms (Missouri Pacific vs. Kansas, 216 U. S., page 262).

In connection with this phase of our argument we call attention to the briefs of parties appellants and amici curiæ in No. 206, Railroad Commission of Wisconsin, et al vs. Chicago, Burlington & Quincy Railroad Company, now before the court for consideration, and adopt same, together with argument therein as the support for views and reasoning herein.

Right to Order Abandonments and Extensions:

Congress can invest the Interstate Commerce Commission with no judicial powers. We consider this primary and offer no argument.

The questions here involved as to the power to order abandonments are thoroughly and tersely set forth in appellant's brief in No. 298, State of Texas vs. Eastern Texas Railroad Company, which is before the court. We refer to it and give no further discussion of the question, except as to extensions.

In the brief above referred to it is considered for the purpose of argument only that Congress may have power to order extensions. We now assert it has no such power in the manner it has attempted to exercise it. There is always available to the carrier, its stockholders and lien holders, for all of whom the State is sponsor, the plea that their property cannot be taken without due process of law nor for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution. In fact this is the first subject for consideration. It is clearly a matter for judicial ascertainment, a thing the Interstate Commerce Commission cannot do. If Congress can find impediments in the way of commerce which it may remove by extensions of lines, it must, nevertheless, comply with the Constitution and provide not only just compensation for the property taken, either in guaranteeing returns on the investment, or reducing the carriers' investment by payment of a portion so it can reasonably make such return, but it must provide for a proper adjudication of the questions involved by a tribunal which it can constitutionally clothe with such authority.

Regulation of Stocks, Bonds and Securities

This brings us to the consideration of a subject the value of which in the regulation of interstate commerce is most fanciful. No imagination of the human mind can conceive and certainly no facts exist which warranted Congress in its conclusion that the States have, or will, in the proper exercise of their police powers in the regulations of the issuance, sale and ownership of stocks, bonds and securities, place any burdens upon or in any manner embarrass interstate commerce. Here the interests of intrastate and interstate commerce go hand in hand. There can be no clashing of interests. The State is in far better

position to expeditiously exercise this control than the general Government. Heretofore it has been entrusted to them and the decisions of this court have repeatedly proclaimed such as powers of the States under the Constitution. (L. & N. Ry. vs. Ky., 161 U. C. 677, 702 and Northern Sec. Co. vs. U. S., 193 U. S. 347.) No abuse of such power seems to have actuated and prompted the legislation. If such abuse of the State's police powers should occur, the State would, nevertheless, be entitled to its day in court and to have its rights in each case judicially determined under such procedure as Congress may under the Constitution provide. This it has not done. The regulation of stocks, bonds and securities of a corporation is a necessary incident to its creation. The Constitution has reserved to the States the power to create corporations, Congress has no right, either by direct legislation or by circumscription to destroy such power.

In view of the line of decisions by this court from which those above referred to are taken, it seems to us that this provision of the Act complained of is clearly unconstitutional and that the Interstate Commerce Commission should be restrained in accordance with Complainant's prayer.

Section II

The Railroad Labor Board:

The Railroad Labor Board's Act presents to us the most foreign, most socialistic, most feudalistic, most unauthorized and most pernicious matter ever emitting from our legislative mill. It is so foreign to any plan or characteristic of our Government that we hesitate to launch an attack upon it within the general rule of reason heretofore appealing to this court. Yet we are confronted with it as an usurpation of the rights of the people under the guise of

Constitutional legislation, clothed in the cloak of judicial sanction in name only by reason of the opinion in Wilson, et al vs. New, et al, 243 U. S. 332.

It shall be our purpose to show first of all, that the case above referred to does not sustain the act under consideration. Having all the objectionable features of the former act, it goes a great deal further. The one was called forth to meet an emergency and save the commerce of the country, and for that reason was held valid. The other came forth to create emergencies and hamper the commerce of the country in the interest of a class or classes. This has been its history from the beginning and the admitted facts in this case are not exceptions but the inevitable results of its application. Neither the admitted facts heretofore stated nor the attacks upon its constitutionality heretofore enumerated need be repeated. The loss to the producers, shippers and carriers stated in the bill is a loss to interstate commerce which it was the duty of Congress to prevent and not to entail. Such losses are the direct results of the Act: its benefits to commerce have not been discovered and we are unable to conceive them yet.

The Act is embraced in Sections 300 to 316, Transportation Act, 1920, S. L. 41, 469. Conceding, as we must, that Congress has the power to regulate the wages of employees when necessary to do so for the interest of commerce, it by no means follows that it can arbitrarily ro so and in the manner it has attempted. Where legal rights exist in parties at interest they must be adjudicated by a court of competent jurisdiction. When penalties are prescribed, they must be fixed and certain. Here, we are constrained to remark, parenthetically, that the disposition of Congress manifest in the entire Act complained of in the bill to ignore if not to usurp the functions of the Judicial branch of

our Government, deserves the condemnation within the power of this Court to give.

As authority for our contention that the Act violates the due process clause and private property clause of the Fifth Amendment we refer to:

Dartmouth College Case, 4 Wheat. 518.
Chicago, B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226.
McGehee on Due Process of Law, p. 30.
Monongahela Navigation Co. vs. U. S. 148 U. S. 312-36.
United States vs. Lynch, 188 U. S. 445.
Adair vs. United States, 208 U. S. 161, 180.
United States vs. Cress, 243 U. S. 316.

The features of the Act which render it obnoxious and work a departure from any legislation heretofore sanctioned by Federal or State authority are the methods of appointment of members of the board and the punishment it may mete to those who fail or refuse to follow its "findings."

Paragraph 2 of Section II, or Article II, of our Constitution provides for the appointment of all officers by the President "by and with the advice and consent of the Senate," power being given to Congress to provide by law for the appointment of "such inferior officers as they may think proper in the President alone, in the courts of law and in the heads of departments." So inclusive are the words of this paragraph as to make it equally as exclusive. Certainly Congress has no power to broaden the appointive powers above granted. Has it done so? The board consists of nine members to be selected from three classes, not qualifications, to wit: employees, employers and the public. True the Act places the appointment in the President "by and with the advice and consent of the Senate," but, as to the first two sections, both the President and Senate are restricted, advised and must yield to the wishes, demands and limitations of the two classes, and make, in

each instance, the appointment from the six whose names are presented in such manner as the Interstate Commerce Commission may prescribe. No authority can share in the appointing power except as provided by the Constitution.

French vs. State, 29 L. R. A., 113. (Ind.)
Overshiner vs. State, 51 L. R. A., 748 (Ind.)
State ex rel. Crow vs. Towns, 54 S. W. 552. (Mo.)
Bridges vs. Sheleross, 6 W. Va. 562.
Harvey vs. State, 21 N. E. 890. (Ind.)
Ex parte Lucas, 61 S. W. 218 (Mo.)

The board, when organized, is a body corporate, an agency of the Government, one of its component parts. They receive and docket petitions as a court, administers oaths, hear testimony, make findings of fact, reach conclusions of law and issue and record judgments and decrees. They fix punishment—the penalty being to publish the fact that any party has failed or refused to obey its edicts, thus holding such party up before the patronizing public as in contempt in such manner as they may choose. The effect of this cannot be computed. It is cruel, indefinite and violates the Fourth, Fifth and Eighth Amendments to the Constitution.

In Re: Birdsong, 39 Fed. 599.
Stoutenburgh vs. Frazier, 48 L. R. A. 220.
Cooley (7th Edition) on Excessive Fines and Cruel and Unusual Punishments, page 471. (473-N1)

We assume there will be no contention upon the part of defendant that the members of the board are not officers under the contemplation of the Constitution. It occurs to us this could not be questioned by any line of authorities, however, we submit the following authorities:

Guthrie Daily Leader vs. Cameron, 41 Pac. 635.
Hendricks vs. State, 49 S. W. 705.
15 Amer. Digest, page 689 (A) 1.
37 Cent. Digest: Officers, page 1816 (A) 1 and 4.

CONCLUSION

Complainant has power to sue and the court has jurisdiction of actions brought by it. More than one question has been properly pleaded as to each defendant upon which this Court should render judgment. The facts pleaded as to the abuse of power by each defendant warrants the Court in restraining such acts regardless of the validity of the law under which they pretend to act.

We submit both motions should be denied and plaintiff's bill sustained.

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Washington, D. C., December 3, 1921.

*Since this brief has been in course of preparation C. M. Cureton has been appointed Chief Justice of the Supreme Court of the State, and W. A. Keeling has succeeded him as Attorney General.

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Original No. 24. In Equity.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

STATE OF TEXAS, COMPLAINANT,

v.

THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD LABOR BOARD, DEFENDANTS.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Interstate Commerce Commission, Defendant.

OCTOBER, 1921.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

STATE OF TEXAS, COMPLAINANT, v. THE INTERSTATE COMMERCE COMMISSION and the Railroad Labor Board, defendants.	Original No. 24. In Equity.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

The State of Texas, by its Attorney General, asks the court to declare to be invalid, unconstitutional, and void certain amendments to the interstate commerce act, contained in the transportation act, 1920. That is the extent to which this suit affects this defendant, the Interstate Commerce Commission, which for convenience will be called hereinafter the Commission. The Commission filed a motion to dismiss the bill of complaint, the effect of which is to admit for the purposes of the motion the allegations which are well pleaded. We therefore summarize pertinent paragraphs of the bill as follows:

In Paragraphs I, II, and III the parties and the subject matters over which they exercise jurisdiction are described.

In Paragraph IV it is alleged: That all railway corporations which own and operate lines of railway in the State of Texas are incorporated and chartered under the laws of the State, except the Texas & Pacific Railway Company, which is chartered under the laws of the United States.

In Paragraph V it is alleged: That in 1845 Texas was admitted into the Union; that it has since been continuously a State of the United States, and that it was so admitted on an equality with other States in all respects whatsoever, except that it retained the ownership of, and ever thereafter continued to own, all public lands within its borders.

In Paragraph VI it is alleged: That, in the Constitution of the United States, no power of police or legislation with respect to the internal affairs and intrastate commerce of Texas is delegated to the National Government.

In Paragraph VII it is alleged: That among the powers reserved to the States are, the right to regulate intrastate commerce, and all rates, fares, wages, charges, and contracts relative thereto entered into or made effective within any State, and the right to regulate private corporations, and combinations and restrictions in trade and commerce in intrastate commerce.

In Paragraph VIII it is alleged: That, under its several constitutions and various statutes, the State of Texas has exercised the powers reserved to it as aforesaid, and that its constitution contains provisions as stated in this paragraph.

In Paragraph IX it is alleged: That, under its constitution, the State of Texas has enacted a full and complete code of laws relating to railroads and common carriers, corporations, trusts and monopolies, and that said laws contain provisions as stated in this paragraph.

In Paragraph X it is alleged: That the State of Texas has granted to various railroad corporations of that State approximately 24,454,713 acres of land, upon condition that they comply with the terms of their charters, including laws applicable to rates, fares, charges, classifications, regulations and practices prescribed by laws of the State or by agencies of the State, and that the charters, so conditioned, were accepted by the corporations and are now contracts and binding upon such corporations and their successors.

In Paragraph XI it is alleged: That, with one exception, the Gulf, Colorado & Santa Fe Railway Company, which owns a small amount of mileage in Oklahoma, the State of Texas has confined the corporate powers of railway corporations chartered by it within the limits of the State; that the State has prohibited any corporation, except one chartered by it or by the United States, from owning or operating any railroad in Texas, and that no railroad corporation, except the Texas & Pacific Railway Company, operates in Texas under a United States charter.

In Paragraph XII it is alleged: That bonds in the aggregate amount of approximately $358,382,410 have been issued by railroad corporations chartered

by Texas, upon condition that the corporations shall operate their lines of railroad in accordance with the laws of the State and be governed by the lawful rates, fares, charges, classifications, regulations and practices prescribed by the State, and that the State has not consented to the abrogation of such obligation.

In Paragraph XIII it is alleged: That within the State of Texas the constitution and statutes of the State are applicable to the line of railroad operated by the Texas & Pacific Railway Company; that all the railroad corporations of the State are bound to observe the rates, fares and charges of the State, and that the State has never consented to the abrogation of this obligation.

In Paragraph XIV it is alleged: That the State of Texas is not asking the court to determine whether the charter contracts referred to exist; that allegations concerning such contracts are made simply to show that the power and authority attempted to be conferred on the Commission to determine and fix rates, fares and charges for intrastate commerce within the State of Texas, to determine when railway corporations within the State may cease operation, and take up and abandon their lines of railway, or construct additional lines of railway, or issue stocks, bonds and securities, or form pools and combinations, or consolidations, can not constitutionally be conferred upon the Commission, and that the provisions of the transportation act which purport to confer such authority are unconstitutional.

In Paragraph XV it is alleged: That the Government of the United States and the Congress, and the Commission, have no authority to determine a justiciable question where the rights of a State are involved; that such a question can be determined only by the Supreme Court of the United States; that no citizen of the State of Texas or of any other State, and no corporation of any kind or character, can bring an action against the State of Texas, or against those acting for it as public officers, in any court, or before the Commission, without the consent of the State of Texas; that such consent has not been given, and that subdivisions 18 to 22, inclusive, of section 402 of the transportation act, which purport to confer certain authority upon the Commission, including authority to determine justiciable questions like the one above mentioned, and to confer certain authority upon railroad corporations of the State of Texas, are unconstitutional.

In Paragraph XVI it is alleged: That section 407 of the transportation act, particularly paragraph 1, and subdivisions 4, 5, 6 and 8, which purport to confer certain authority upon the Commission, and upon railroad corporations of Texas, in connection with contracts, agreements, combination and consolidations, in derogation of the constitution and laws of the State, is unconstitutional.

In Paragraph XVII it is alleged: That section 439 of the transportation act, which purports to confer upon the Commission control over the issuance of stocks, bonds and other securities, and over the as-

sumption of liability as lessor, lessee, guarantor, indorser, surety, or otherwise, by railroad corporations of Texas, in derogation of the constitution and laws of the State, is unconstitutional.

In Paragraph XVIII it is alleged: That section 422 of the transportation act, which, among other things, purports to authorize and require the Commission to initiate, modify, establish or adjust rates, fares, charges, classifications, regulations and practices so that carriers as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation, is unconstitutional.

In Paragraph XIX it is alleged: That section 416 of the transportation act, which, among other things authorizes and requires the Commission, after full hearing in the premises, to prescribe intrastate rates, fares, charges, classifications, regulations and practices, to remove undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and section 418 of the transportation act, which, among other things, authorizes the Commission, after full hearing in the premises to deter-

mine and prescribe just and reasonable individual or joint rates, fares, charges, classifications, regulations and practices, to take the place of rates, fares, charges, classifications, regulations or practices found by the Commission to be unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of the interstate commerce act, are unconstitutional.

As a matter of substance, Paragraph XX contains allegations relating only to the Railroad Labor Board.

In Paragraph XXI, in so far as it relates to action of the Commission, it is alleged: That, under authority and direction of the transportation act, the Commission has fixed fares and charges for the transportation of passengers and freight which are unjust and unreasonable, and which cause and have caused great loss to the producers and shippers of the State of Texas, and great diminution of freight and passenger traffic to the railroads of the State, and cause and have caused great financial loss to the people of the State; that the Commission has granted certificates of convenience and necessity to railroads within the State authorizing and directing them to cease operation of trains and to dismantle their railroads and dispose of their physical property contrary to the constitution and laws of the State, and in disregard of their contract obligations to the people of the State; that the Commission has refused to grant certificates of convenience and necessity and to permit railroads within the State to advertise and charge

fares and freight rates and to receive passengers and freight from connecting carriers and transport same in accordance with the laws of the State, and has refused to permit the construction of railways within the State by persons and corporations who have complied with the constitution and laws of the State regulating the chartering, organization, construction and maintenance of railways wholly within the State; that the Commission is attempting to supervise and regulate the issuance of bonds, certificates and other securities by the railroads of the State, which were issued in accordance with the constitution and laws of the State; that as a consequence the railroads and people of the State are compelled to submit to the demands and to conform to the rules and regulations of the Commission at an unnecessary expense and at great inconvenience, and that the result is a loss of property and the taking of their property without due process of law; that, contrary to the constitution and statutes of the State, and contrary to the Constitution of the United States, the Commission has issued an order placing the State of Texas within what is designated as the "western freight group," and has required and will continue to require the railroad companies of the State to charge and "control" rates, fares and charges contrary to the constitution and statutes of the State, contrary to the Constitution of the United States, and contrary to said contracts of the railroad companies; that as a consequence the State is and will be called upon to pay more than its just share upon property

within the State to supply the operating income demanded by the railroads of the United States; that the Commission intends to and will authorize the creation and operation of trusts, combinations and monopolies among railroads in the State, regardless of the constitution and statutes of the State, and thereby deprive the people of the State of their right to have competing carriers and freight competition, and that the State has been, is being, and will continue to be sued and made a party to suits involving the rights, powers, privileges, sovereignty, and property of the State, before the Commission, contrary to the constitution.

The last subdivision of Paragraph XXI reads as follows:

> Complainant further alleges that great and grievous injury and damage is resulting to it and its citizens by reason of the enactment of the act of Congress known as "the transportation act of 1920"; that it is shorn of large powers of sovereignty, viz, legislative, executive and judicial powers reserved to it by the Constitution of the United States, and it is deprived of privileges and immunities guaranteed to it as a sovereign under the Constitution of the United States, and that citizens situated in the boundaries of Texas and that its citizens and railroads are unauthorized to do and prohibited from doing acts and things otherwise legal and lawful except for the provisions of said act and the acts of the defendants herein.

There are attached to the bill of complaint, as exhibits, the above-mentioned provisions of the transportation act and of the interstate commerce act.

ARGUMENT.

I.

The bill of complaint does not present for determination a case or controversy within the original jurisdiction of the court.

It will be observed that in and by its bill the complainant, the State of Texas, does not place before the court facts sufficient to enable it to pass upon and determine any "case or controversy," within the judicial meaning of those terms. Instead, complainant calls attention to certain provisions of the transportation act on the one hand, and of the constitution and statute laws of the State of Texas on the other hand, sets forth reasons why, in its opinion, the former are in conflict with the latter and deprive complainant of its right to regulate, in the interests of its citizens, common-carrier railroad corporations and their business, in intrastate commerce, within the State of Texas, and asks the court to declare to be unconstitutional the provisions of the transportation act whose validity is thus challenged. In other words, the primary purpose, and, according to our understanding, the only purpose shown in complainant's bill is to obtain from the court, without presenting to it for determination any concrete case or controversy, an interpretation of a statute passed by Congress, providing for the regulation of

interstate and foreign commerce and common carriers therein engaged.

It is true that in the seventh subdivision of Paragraph XIX of its bill complainant calls attention to action taken by the Commission in *Ex parte 74*, wherein the Commission, for the purpose of complying with the mandate contained in section 15a of the interstate commerce act, authorized certain common carriers, subject to said act and to the jurisdiction of the Commission thereunder, to make certain increases in their rates, fares and charges for the transportation of passengers and property in interstate commerce, and also calls attention to action taken by the Commission in the Texas, Illinois, Nebraska, New York, Wisconsin, Arkansas, Minnesota, Indiana, Michigan and Louisiana cases, numbered respectively, 11764, 11703, 11829, 11623, 11763, 11775, 11776, 11894, 11762 and 11863, wherein the Commission required certain common carriers, subject to said act and to the jurisdiction of the Commission thereunder, to make certain increases in their rates, fares and charges for the transportation of passengers and property in intrastate commerce, for the purpose of removing undue and unreasonable advantage to and preference of persons and localities in intrastate commerce, undue and unreasonable prejudice to persons and localities in interstate commerce, and unjust discrimination against interstate commerce, found by the Commission to exist, but it is also true that, in and by its bill, complainant does not attempt to show that in

taking such action the Commission exceeded the power conferred upon it by said interstate commerce act.

In the Texas case mentioned the Commission, among other things, said:

> The record herein is silent as to interstate and intrastate commutation and other multiple forms of tickets, extra fares on limited trains, club-car charges, and rates for the transportation of milk and cream, and no findings are herein made with respect thereto.
>
> We are of opinion and find, subject to the reservations above noted, that the increases made by the respondents pursuant to our findings in *Ex parte 74* in the charges for freight service, including switching and incidental services, and for the transportation of passengers, including the surcharges on passengers in sleeping and parlor cars, and now in effect within the group herein considered, result in reasonable rates, fares, and charges for interstate transportation within that group, and that the failure of the respondents to increase correspondingly all of their rates, fares, and charges for intrastate traffic within the State of Texas has resulted and will result in intrastate rates, fares, and charges lower than the corresponding rates, fares, and charges contemporaneously maintained on interstate traffic within the State of Texas and between points in the State of Texas and points in other States within that group; in undue and unreasonable advantage to and preference of persons and localities in intrastate commerce within the State of Texas; in undue and un-

reasonable prejudice to persons and localities in interstate commerce; and in unjust discrimination against interstate commerce.

We further find that said undue preference and prejudice and unjust discrimination can and should be removed by making increases in said intrastate rates, fares, and charges which shall correspond with the increases heretofore made by respondents as aforesaid and now in effect in their interstate rates, fares, and charges within that group.

We further find that, whether the aforesaid rates, fares, or charges pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services in each instance are performed by the carriers under substantially similar circumstances and conditions. Schedules filed in compliance with the order herein may be made effective upon not less than five days' notice.

The above findings are without prejudice to the right of the authorities of the State of Texas or any other interested party to apply in the proper manner for a modification of our findings or order with respect to any specified intrastate rate, fare, or charge on the ground that the latter is not related to the interstate rates, fares, or charges in such a way as to contravene the provisions of the interstate commerce act.

And in the other State cases referred to the Commission made similar findings of fact and based the action taken by it therein upon said findings. In this connection the Commission calls the attention of

the court particularly to 60 I. C. C. 421, 426–427; 59 I. C. C. 350, 365–366; 60 I. C. C.305,313–314; 59 I. C. C. 290, 298–299; 59 I. C. C. 391, 396–397; 59 I. C. C. 471, 478–479; 59 I. C. C. 502, 506–507; 60 I. C. C. 337, 347–349; 60 I. C. C. 245, 248–249, and 60 I. C. C. 467, 474–475, 480.

Muskrat v. *United States* and *Brown and Gritts* v. *United States*, 219 U. S. 346, were cases instituted in the Court of Claims and taken by appeal to this court, in accordance with the authority conferred by an act of Congress of March 1, 1907, for the purpose of testing the constitutional validity of certain other acts of Congress. Pertinent portions of said act of March 1 were:

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts or any of them attempt to increase or extend the restrictions upon alienation, encumbrance, or

the right to lease the allotments of lands of Cherokee citizens or to increase the number of persons entitled to share in the final distribution of land and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two. (Id. 350–351.)

And in ordering the petitions dismissed for want of jurisdiction this court, speaking through Mr. Justice Day, said:

> It is * * * evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made

a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution. * * * If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies

> arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning. (Id. 361–362.)

Stearns v. *Wood*, 236 U. S. 75, was an appeal from a decree of the District Court of the United States for the Northern District of Ohio, dismissing the original bill because in it no cause of action was stated. In dismissing the appeal, this court, speaking through Mr. Justice McReynolds, said:

> The brief in behalf of appellant states that "this action is a test case brought by an officer of the National Guard against the adjutant general of Ohio, who are nominal complainant and respondent, and involves the construction of certain constitutional provisions, as follows:" Art. 1, sec. 8, par. 16; the second amendment; the tenth amendment; art. 1, sec. 8, par. 15; the preamble to the Constitution; the provision making the President Commander in Chief of the militia when called into the Federal service; the power granted to Congress to raise and support armies. "The action also seeks a construction with respect to the right of the President and Congress over the National Guard of the several States, and the status and legal relation of the officers thereof to the War Department; and raises the further question whether the National Guard or Organized

Militia may be used without the territorial limits of the United States, as such."

The general orders referred to in the bill do not directly violate or threaten interference with the personal rights of appellant—a major in the National Guard whose present rank remains undisturbed. He is not therefore in position to question their validity; and certainly he may not demand that we construe orders, acts of Congress, and the Constitution for the information of himself and others, notwithstanding their laudable feeling of deep interest in the general subject. The province of courts is to decide real controversies, not to discuss abstract propositions. *Little* v. *Bowers*, 134 U. S. 547, 557; *California* v. *San Pablo Railroad*, 149 U. S. 308, 314; *Richardson* v. *McChesney*, 218 U. S. 487, 492; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 648. (Id. 77–78.)

To the same effect, see also *State of Oklahoma* v. *A., T. & S. F. Ry. Co.*, 220 U. S. 277, and *State of Oklahoma* v. *G., C. & S. F. Ry. Co.*, 220 U. S. 290.

II.

There is no Equity in the Bill of Complaint.

In this connection we will summarize provisions of the transportation act complained of, in so far as they relate to matters over which the Commission exercises jurisdiction.

Paragraphs (18) to (22) of section 402 of the transportation act, referred to in Paragraph XV of the bill, amend the interstate commerce act and are paragraphs (18) to (22) of section 1 of the latter act.

In paragraph (18) it is provided: That no carrier by railroad subject to the interstate commerce act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under the interstate commerce act over or by means of such additional or extended line of railroad, unless and until it shall have obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and that no such carrier shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until it shall have obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Paragraph (19) authorizes the Commission to make and put in force rules and regulations pertaining to such applications and the issuance of such certificates and prescribes otherwise the method of procedure to be followed by the Commission in the premises, including in each instance a hearing after notice to the governor of each State in which the railroads involved are proposed to be constructed, operated or abandoned, and the publication of said notice.

In paragraph (20) it is provided: That the Commission may grant the application in whole or in part, and attach to the issuance of the certificate

such terms and conditions as in its judgment the public convenience and necessity may require; that the carrier to whom the certificate is issued may take action in accordance with the terms thereof; that any construction, operation, or abandonment contrary to the provisions of paragraph (18) or paragraph (19) may be enjoined by a court of competent jurisdiction at the suit of the United States or the Commission, or any commission or regulating body of the State or States affected, or any party in interest, and that any violation of paragraph (18) or paragraph (20) may be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

In paragraph (21) it is provided: That the Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to the interstate commerce act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in the latter act, and to extend its line of railroad; that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public, and that any carrier subject to the interstate commerce act which refuses or neglects to comply with such an

order shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

By paragraph (22) there are excepted from the jurisdiction conferred upon the Commission by paragraphs (18) to (21) spur, industrial, team, switching or side tracks, located or to be located wholly within one State, and street, suburban and interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 407 of the transportation act, referred to in Paragraph XVI of the bill, amends section 5 of the interstate commerce act, and, of the latter section,

Paragraph (1) provides: That it shall be unlawful for any carrier subject to the interstate commerce act to enter into any contract, agreement, or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof, and that, after hearing upon an application of any such carrier, or upon its own initiative, the Commission may permit such division of traffic or earnings to the extent indicated by it, if it is of opinion that the division will be in the interest of better service to the public, or economy in operation, and not unduly in restraint of competition, if such division is assented to by all the carriers involved, under such rules and regulations, and for such consideration as between such carriers and upon

such terms and conditions, as the Commission shall find to be just and reasonable.

Paragraph (2) provides: That, after hearing, upon the application of any such carrier or carriers, the Commission may authorize the acquisition, to the extent indicated by it, by one of such carriers of the control of any other such carrier or carriers, either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, if the Commission is of opinion that such control will be in the public interest, under such rules and regulations and for such consideration and on such terms and conditions as the Commission shall find to be just and reasonable.

Paragraph (3) provides: That the Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or paragraph (2) as it may deem necessary or appropriate.

Paragraph (4) provides: That the Commission shall prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems; that in doing so it shall preserve competition as fully as possible, and, wherever practicable, provide for the maintenance of existing routes and channels of trade and commerce, and that in preparing such plan the Commission shall so arrange that the cost of transportation as between competitive systems and as related to the values of the properties through

which the service is rendered shall be the same, as far as practicable, in order that the systems may employ uniform rates in the movement of competitive traffic and, under efficient management, earn substantially the same rate of return upon the value of their respective railway properties.

Paragraph (5) provides: That, when the Commission has agreed upon a tentative plan for such consolidation of railway properties, it shall give the same due publicity and, upon reasonable notice, including notice to the governor of each State, shall hear all persons who may file or present objections thereto; that the Commission may prescribe the procedure for such hearings; that, after the hearings have been completed, the Commission shall adopt a plan for such consolidation and publish the same; that thereafter, upon its own motion or upon application, the Commission may reopen the subject for such changes or modifications as in its judgment will promote the public interest, and that the consolidations provided for shall be in harmony with the plan to be prepared by the Commission.

Paragraph (6) provides: That two or more carriers by railroad subject to the interstate commerce act may consolidate their properties or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, if the consolidation is in harmony with the plan prepared and adopted by the Commission and is approved by the Commission, and the bonds at par of the corporation

which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, do not exceed the value of the consolidated properties as determined by the Commission. Subdivision (c) of this paragraph authorizes the Commission, upon application, to grant permission to two or more carriers to consolidate their properties, after it has given due notice to the governor of each State in which any part of the properties is situated and to the carriers involved and held a public hearing, if it finds that the public interest will be promoted by the consolidation and that the conditions of said section 5 have been or will be fulfilled. This subdivision also provides that the order of the Commission permitting such consolidation may include such modifications and terms and conditions as the Commission may prescribe, and that thereupon the consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Paragraph (7) provides: That the power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company if application for such authority is made to the Commission within 30 days after the passage of the transportation act.

Paragraph (8) provides: That the carriers affected by any order made under said section 5 and any corporation organized to effect a consolidation approved and authorized in such order shall be relieved from the operation of the antitrust laws as designated in the Clayton antitrust act, approved October 15, 1914, and of all other restraints or prohibitions of law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the provisions of said section 5.

Section 439 of the transportation act, mentioned in Paragraph XVII of the bill, is section 20a of the interstate commerce act, and, of the latter section,

Paragraph (1) provides: That as used in this section the term carrier means a carrier by railroad subject to the interstate commerce act, or any corporation organized for the purpose of engaging in transportation by railroad subject to said act, except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.

Paragraph (2) contains provisions prohibiting a carrier from issuing securities, or assuming obligations or liabilities as lessor, lessee, guarantor, endorser, surety, or otherwise, even though permitted to do so by the authority which created it, except after having obtained the authority of the Commission in the premises, and prescribes the conditions under which the Commission may grant such authority. This paragraph also prohibits the Commission from making an order

granting such authority unless it finds as to such issue or assumption: That it is for some lawful object within the corporate purposes of the carrier; that it is compatible with the public interest; that it is necessary or appropriate for and consistent with the proper performance by the carrier of service to the public as a common carrier; that it will not impair the carrier's ability to perform that service, and that it is reasonably necessary and appropriate for such purpose.

Paragraph (3) authorizes the Commission, subject to the requirements of paragraph (2), to exercise its discretion and to modify its orders from time to time, in the premises.

Paragraph (4) contains provisions relating to the form and contents of applications to be made to the Commission by the carriers.

Paragraph (5) provides: That carriers shall give notice to the Commission, in accordance with the Commission's requirements, concerning the selling, pledging, repledging, or otherwise of securities.

Paragraph (6) requires the Commission, where such an application is made by a carrier, to give notice thereof to, and file a copy of the notice with, the governor of each State in which the applicant carrier operates, and provides for the hearing by the Commission of parties in opposition to favorable action upon the application.

Paragraph (7) authorizes carriers to issue securities and assume obligations or liabilities without obtaining authority other than that of the Commission.

Paragraph (8) provides: That nothing in said section 20a shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

Paragraph (9) authorizes a carrier, without the consent of the Commission, to issue notes maturing within two years from their respective dates which shall not at any time exceed in the aggregate five per cent of the value of the securities of the carrier outstanding, and requires the carrier to notify the Commission, in such form as the Commission may prescribe, of the issuance of such notes, within ten days from the respective dates of issue. This paragraph also provides that in any subsequent funding of such notes the provisions of this section respecting other securities shall apply.

Paragraph (10) provides: That the Commission shall require periodical or special reports from each carrier, of securities, including such notes, which shall show in such detail as the Commission may prescribe the disposition to be made of the securities and the application of the proceeds thereof.

Paragraph (11) makes void any securities issued and any obligation or liability assumed by a carrier without such authority from the Commission, but provides that no such security, obligation, or liability shall be made void by any matter which precedes the Commission's order of authorization. This section further provides that a person who invests money in a security, obligation, or liability, so made void, in good faith and without notice of the inva-

lidity, may hold jointly and severally liable and collect the full amount of damages from the carrier and its directors, officers, attorneys, and other agents, involved; that where a person purchases such a security directly from the carrier issuing it he may rescind the transaction and upon the surrender of the security recover the consideration given by him therefor, and that for each violation of any of said provisions of the section a fine of not less than $1,000 nor more than $10,000, or imprisonment for not less than one year nor more than three years, or both, shall be the penalty.

Paragraph (12) prohibits any person, after December 31, 1921, from holding the position of officer or director of more than one carrier, unless authorized to do so by the Commission, upon due showing, in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby, and makes it unlawful for any officer or director of a carrier to derive benefit from securities issued or to be issued by the carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account and, for a violation of any provision of this paragraph, provides a penalty of not less than $1,000 nor more than $10,000 fine, or imprisonment for not less than one year, nor more than three years, or both.

Section 422 of the transportation act, mentioned in Paragraph XVIII of the bill, is section 15a of the interstate commerce act, and, of the latter section,

Paragraph (1) provides: That, as used in the section, the word "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto, the word "carrier" means a carrier by railroad or partly by railroad and partly by water, subject to the interstate commerce act, and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents, except that sleeping car companies and express companies, street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof, is not included in said section.

Paragraph (2) requires the Commission to make rates which will yield to the carriers as a whole, or as a whole in each group or territory designated by the Commission, a fair return, as nearly as may be, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, upon the aggregate value

of the property used by the carriers in serving the public, except that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Paragraph (3) requires the Commission to determine and make public from time to time such fair return, but for the two years beginning March 1, 1920, limits the return to 5½ per cent upon such aggregate value, except that it authorizes the Commission to add one-half of 1 per cent to make provision in whole or in part for improvements, betterments, or equipment. This paragraph also requires the Commission, in making such determination, to give due consideration, among other things, to the transportation needs of the country and the necessity, under honest, efficient, and economical management of existing transportation facilities, of enlarging such facilities in order to provide the people of the United States with adequate transportation.

Paragraph (4) requires the Commission, from time to time, as may be necessary, to fix such aggregate value, and, in doing so, to give due consideration to all elements of value for rate-making purposes recognized by law. This paragraph further provides that when the Commission fixes a value for the property of any carrier under section 19a of the interstate commerce act that shall be the value used by the Commission in determining such aggregate value.

Paragraph (5) contains a declaration that it is impossible, without regulation and control in the interest of the commerce of the United States considered as a whole, to establish uniform rates upon competitive traffic which shall adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, and provides that, for this reason, any carrier which receives such an income so in excess of a fair return shall hold the portion of the excess mentioned in paragraph (6) for, and pay it to, the United States.

Paragraph (6) provides: That one-half of such excess shall be placed in a reserve fund to be established and maintained by the carrier; that the other one-half shall be paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund; that, in each instance, the value used in this connection shall be the value of all the property operated as a single system, regardless of separate ownership of, or separate accounting returns for, various parts of the system. This paragraph further provides that, where a carrier accepts the provisions of section 209 of the transportation act, said paragraph (6) shall not be applicable to income for any period prior to September 1, 1920.

Paragraph (7) authorizes a carrier to use the reserve fund to pay interest on stocks, bonds, or other securities, or to pay rent for leased roads, where the carrier's net railway operating income for any year is less than said 6 per cent, but prohibits the use of such fund for any other purpose.

Paragraph (8) authorizes a carrier to use, for any lawful purpose, its income in excess of a reserve fund of 5 per cent of the value of its property used in serving the public.

Paragraph (9) requires the Commission to prescribe rules and regulations for the determination and recovery of excess income payable to it by carriers, and authorizes the Commission to require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. This paragraph also requires the Commission to make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

Paragraph (10) makes the general railroad contingent fund a revolving fund to be administered by the Commission and authorizes the Commission, in furtherance of the public interest in railway transportation, to make loans to carriers and purchase transportation equipment and facilities. This paragraph further provides that any moneys in the fund not so employed shall be invested in obligations of the

United States or deposited in authorized depositaries of the United States.

Paragraph (11) authorizes carriers to make applications to the Commission for loans, makes certain requirements concerning the contents of such applications, and authorizes the Commission to make other requirements in this connection.

Paragraph (12) authorizes the Commission to make such a loan if the Commission finds the loan is necessary to enable the applicant properly to meet the transportation needs of the public and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor and meet its other obligations in connection with the loan. This paragraph also provides that the Commission shall prescribe adequate security and that the rate of interest to be paid by the carrier shall be 6 per cent per annum and payable semiannually.

Paragraph (13) authorizes carriers to make applications to the Commission for leases of equipment or facilities purchased by the Commission under authority conferred upon it as aforesaid, makes certain requirements concerning the contents of said applications, and authorizes the Commission to make other requirements in the premises.

Paragraph (14) authorizes the Commission to make such a lease if it finds the lease necessary to enable the applicant properly to meet the transportation

needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under the lease. This paragraph also provides: That the Commission may fix the time the lease is to be in force and the terms and conditions of the lease, and that the rental charges provided for shall be at least sufficient to pay a return of 6 per cent per annum, plus an allowance for depreciation to be determined as provided in paragraph (5) of section 20 of the interstate commerce act, upon the value of the equipment or facilities leased.

Paragraph (15) authorizes the Commission to acquire, maintain, replace, and sell, such equipment and facilities, and to carry out contracts in connection therewith, to the extent that moneys in said fund will permit.

Paragraph (16) authorizes the Commission to prescribe rules and regulations pertaining to said loans and leases.

Paragraph (17) provides: That the provisions of said section 15a shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, and also provides that no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of said section.

Paragraph (18) authorizes the Commission to permit a carrier, or a corporation organized to construct and operate a railroad, to retain such excess income on a new line for a period not greater than ten years, upon condition that the construction of the line shall be completed within a period to be designated by the Commission.

Section 416 of the transportation act, mentioned in Paragraph XIX of the bill, amends section 13 of the interstate commerce act by adding thereto paragraphs (3) and (4).

Paragraph (3) authorizes carriers to file petitions before the Commission bringing in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by the authority of a State, or initiated by the President during the period of Federal control, and requires the Commission, when such an issue is made before it in any investigation under the provisions of the interstate commerce act or in any investigation instituted upon the petition of a carrier, to cause the State or States interested to be notified of the proceeding. This paragraph also authorizes the Commission to confer and hold joint hearings with, and to avail itself of the cooperation, services, records, and facilities of, such State authorities, in the enforcement of any provision of said act, where the rate-making authority of a State is or may be affected by the action which may be taken by the Commission.

Paragraph (4) provides: That, "whenever in any such investigation the Commission, after full hearing,

finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination," and that "such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 418 of the transportation act, mentioned in Paragraph XIX of the bill, amends section 15 of the interstate commerce act, and the portion of said section 15 complained of is paragraph (1), which reads:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or with-

out any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this act for the transportation of persons or property or for the transmission of messages as defined in the first section of this act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed,

> or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Complainant's contention that the provisions of the transportation act and of the interstate commerce act, complained of by it, are unconstitutional appears to us to be based upon the view that such provisions can not reasonably be so construed as to avoid unauthorized interference with complainant's sovereign right to regulate the business of common carriers within the State of Texas in commerce which is *purely* intrastate, but we think this view is erroneous. We believe the court will experience no difficulty in determining that in the action taken by it Congress manifested no disposition to interfere with or regulate, or to authorize the Commission to interfere with or regulate, any commerce which is purely intrastate. It will be observed that in each instance the provisions are applied only to interstate carriers and to the business done by them as common carriers in interstate and foreign commerce. The authority over intrastate commerce conferred upon the Commission is only incidental to the duties imposed and the authority conferred upon it in connection with the regulation of interstate and foreign commerce, and neither authorizes nor requires the interference mentioned. In each instance Congress has prescribed rules by which the Commission is to be guided in reaching conclusions concerning the matters

it is required to pass upon and determine, and has required the Commission to issue notices, make investigations, accord to interested parties a full and fair opportunity to be heard, and to take such other action in the premises as may be necessary to satisfy the requirements of due process of law.

In connection with the authority conferred upon the Commission by paragraphs (18) to (20) of section 1 of the interstate commerce act, which relate to the construction, acquisition, operation, and abandonment of lines of railroad, the Commission is required to issue notices and hold hearings, and may not properly issue the certificates referred to unless it finds that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, and that the present or future public convenience and necessity permit of the abandonment.

By paragraph (21) of said section, which relates to the providing by carriers of full and adequate facilities, the Commission is required to hold a hearing, and may not properly grant the permission, or make the requirement, referred to, unless it finds that the extension involved is reasonably required in the interest of the public convenience and necessity and that the expense involved in providing the extensions or facilities will not impair the ability of the carrier to perform its duties to the public.

By paragraph (1) of section 5 of said act, which relates to the divisions of traffic and earnings of carriers, the Commission is required to hold a hear-

ing, and may not properly authorize the divisions unless it finds that they will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition.

By paragraph (2) of said section 5, which relates to the acquisition of control by one carrier over another carrier, short of consolidation, the Commission is required to hold a hearing, and may not properly authorize the acquisition unless it finds it will be in the interests of the public.

By paragraphs (4) and (5) of said section 5, which relate to the preparation and adoption by the Commission of a plan for the consolidation of railway properties, the Commission is required to issue notices and hold hearings, and may not publish a complete plan which does not preserve competition as fully as possible and, wherever practicable, preserve also existing routes and channels of trade and commerce.

By paragraphs (6) and (7) of said section 5, which relate to the consolidation by carriers of their properties, the Commission is required to issue notices and hold hearings, and may not properly authorize the consolidations unless it finds that the public interest will be promoted thereby and that the conditions of said section have been or will be fulfilled. Some of the conditions are: That the consolidation shall be in harmony with and in furtherance of said complete plan and approved by the Commission, and that the bonds at par of the corporation which is to become the owner of the consolidated proper-

ties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission.

By paragraph (8) of said section 5 carriers are relieved of the operation of the antitrust laws as designated in the Clayton Act of October 15, 1914, and of other restraints or prohibitions, only to the extent that such relief may be necessary to enable the carriers to do anything authorized or required by any order made by the Commission under prior provisions of said section.

By paragraphs (1) to (11) of section 20a of said act, which relate to the issuance of securities and the assumption of liabilities by carriers, the Commission is required to give notice to the governor of each State in which the carrier applying for authority to issue securities or assume liabilities operates, and accord an opportunity to be heard in the premises to the railroad commission, public service or utilities commission, or other appropriate State authority.

By paragraph (12) of said section 20a, which relates to the holding by one person of the position of officer or director of more than one carrier, the Commission may not authorize such holding unless it finds that neither public nor private interests will be adversely affected thereby.

By paragraph (2) of section 15a of said act, which must be read in connection with paragraph (1) of section 15 of said act, the Commission is required to hold hearings and to determine the reasonable-

ness of rates in accordance with the rules prescribed in said paragraph (2).

By paragraph (3) of said section 15a, which relates to the determination by the Commission of the amount of a fair return to the carriers, the Commission is required to give due consideration, among other things, to the transportation needs of the country and the necessity, under honest, efficient, and economical management of existing transportation facilities, of enlarging such facilities in order to provide the people of the United States with adequate transportation.

By paragraph (4) of said section 15a, which relates to the determination by the Commission of the aggregate value of the properties of carriers, the Commission is to determine the value in accordance with rules prescribed by Congress and contained in section 19a of said act.

By paragraph (10) of said section 15a, the manner in which and the purposes for which the railroad contingent fund referred to is to be used by the Commission are described, and the Commission may not properly make loans to carriers from said fund unless it finds certain facts specified in paragraph (12) of said section.

By paragraph (14) of said section 15a, the Commission is required to make certain findings of fact before it may properly exercise the authority conferred upon it to lease to carriers equipment or facilities purchased by the Commission with moneys taken from the contingent fund.

By paragraph (18) of said section 15a, which authorizes the Commission to grant permission to a carrier to retain for a period not exceeding ten years excess earnings derived from new construction, it is provided that the permission shall not be granted except upon condition that the construction shall be completed within a period of time which must be fixed by the Commission.

By paragraph (4) of section 13 of said act, the Commission is required to hold hearings, and to find that the intrastate rates, fares, charges, classifications, regulations, or practices, referred to, cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or undue, unreasonable, or unjust discrimination against interstate or foreign commerce, before it can require any of said intrastate rates, fares, charges, classifications, regulations, or practices to be changed.

Because of the conclusions contained in the bill we have deemed it necessary to analyze closely the provisions of law complained of. In Paragraph XXI complainant appears to have summarized and set forth in concise form the reasons advanced by it in support of its contention that said provisions are unconstitutional. Its first contention is that, under authority and direction of the transportation act, the Commission has fixed fares and charges for the transportation of passengers and freight which are unjust and unreasonable, but whether fares or charges

are unjust or unreasonable are questions, not of law, but of fact, to be determined by Congress, in so far as they relate to interstate or foreign commerce, or to be determined by the Commission under rules prescribed for its guidance by Congress; and the Commission's findings of fact in this connection are binding upon all parties, including the courts, in the absence of a showing that in making them the Commission has acted beyond the power duly conferred upon it. In *Procter & Gamble Company* v. *United States, Interstate Commerce Commission, et al.*, 225 U. S. 282, this court said:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. * * * (Id. 297–298.)

To the same effect, see also *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Company*, 220 U. S. 235, 251–252, and

United States v. *Louisville & Nashville Railroad Company*, 235 U. S. 314, 320.

Complainant further contends that, acting under the aforesaid direction and authority, the Commission, regardless of and in conflict with the constitution and laws of the State of Texas has granted and refused to grant, to carriers, certificates of public convenience and necessity relating to the construction, acquisition, operation and abandonment of lines of railroad, but it will be observed that the carriers referred to are all engaged in interstate commerce, and it is obvious, we think, that the rules under which the Commission acted were prescribed by Congress for the purpose of fostering and protecting such commerce and to provide uniformity in the regulation thereto pertaining.

We make a similar reply to complainant's contention, that the Commission is attempting to supervise and regulate the issuance of bonds, certificates and other securities by the railroads of the State of Texas, which were issued in accordance with the constitution and laws of that State.

Complainant further contends that by placing the railroads of the State of Texas in what is designated as the "western freight group," in accordance with authority conferred upon it by the transportation act, the Commission has rendered it necessary for said railroads to pay more than their just share upon property within the State to supply the operating income demanded by the railroads of the United States, in violation of the statutes and constitution

of the State of Texas and in violation of the Constitution of the United States. We think it is obvious, however, that the action of Congress here complained of was taken for the purpose of promoting, fostering and protecting interstate and foreign commerce, and is therefore within the authority of Congress. It is apparent that unless Congress may provide such regulation for interstate carriers as will enable them to secure a fair return on the aggregate value of the property used by them in serving the general public, it can not properly promote, foster or protect interstate and foreign commerce; and it is also apparent, we think, that if common carriers of intrastate traffic within the State of Texas were compelled to rely entirely upon such traffic for the return mentioned their fares and charges for the transportation of that traffic would necessarily be much greater than they are at the present time.

Complainant further contends that regardless of and in conflict with the constitution and the laws of the State of Texas the Commission, under the authority conferred upon it by the transportation act, intends to authorize the creation and operation of trusts, combinations and monopolies among railroads in that State, but we have seen that the authority referred to may not properly be exercised by the Commission unless it finds that such exercise will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition.

Finally, complainant contends that the necessary effect of the provisions of law complained of is to provide for the determination by Congress, and its agent, the Commission, of justiciable questions which may properly be determined only by this court. We have shown, however, that the questions referred to are not judicial but are instead legislative in character, and that to the extent the Commission has been authorized and required to determine them Congress has prescribed the rules by which the Commission is to be guided.

In our opinion, each of and all complainant's contentions were answered in the negative by the decision of this court in *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, commonly called the "*Shreveport Case*", from which we quote as follows:

> It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating State legislation."

By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 224; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697; *Smith* v. *Alabama*, 124 U. S. 45, [465], 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, *supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hin-

> drance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, *supra*, pp. 48, 51; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases*, *supra*, p. 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473. (Id. 350–352.)

At the time matters covered by the transportation act were being discussed, Congress was confronted with the necessity of preserving and strengthening

the interstate common carriers of the country, and making them efficient and serviceable agencies for the transportation of interstate and foreign commerce, and also for the transportation of intrastate commerce. After several months of discussion, deliberation and reflection, Congress perfected and put into operation the plan now under consideration, and in doing so we think it did not exceed the power conferred upon it by the Constitution of the United States.

In *McCulloch* v. *Maryland*, 4 Wheat. 316, this court said:

> * * * Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. (Id. 420.)

We believe it can not be consistently contended that the end Congress had in view was not legitimate or within the scope of the Constitution, and we are equally convinced that the means it adopted and put in force are appropriate and plainly adapted to that end.

For the reasons above set forth we insist that the petition in this case should be dismissed.

Respectfully submitted.

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